Supreme Court No. 93262-0
(CoA No. 47523-5-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANDY MATHERS,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF MOVING PARTY AND DECISION BELOW

Petitioner Andy Mathers, the defendant and appellant below, asks this Court to accept review the published Court of Appeals opinion, No. 47523-5-II (issued May 10, 2016). A copy of the slip opinion is attached as an Appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Trial courts have a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs. RCW 10.01.160(3); State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). Where no specific inquiry was made before imposing the Victim Penalty Assessment (VPA) and deoxyribonucleic acid (DNA) collection fee,[1] but the record establishes Mr. Mathers was indigent, does the imposition of additional financial obligations without an individualized inquiry violate this Court's caselaw, the state and federal constitutions, and present a matter of substantial public interest?

2. Although the VPA[2] and DNA[3] collection statutes appear to use language which has been interpreted as mandatory, Blazina indicates that

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[1] RCW 43.43.7541
[2] RCW 7.68.035.
[3] RCW 43.43.7541

the discretion provided by RCW 10.01.160 and GR 34 should extend to these obligations as well. Did the conclusion of the Court of Appeals, that the trial court was required to impose the VPA and DNA collection fee notwithstanding Mr. Mathers' indigency, conflict with this Court's caselaw, present a significant question of constitutional law, and present a matter of substantial public interest?

C. STATEMENT OF THE CASE

Andy Mathers shoplifted a sweatshirt; he subsequently pled guilty to theft in the second degree. CP 8-17; RP 3-8.

At sentencing, Mr. Mathers objected to the imposition of legal financial obligations based on Blazina, and asked the court to strike those obligations.[4] RP 9. Judge Evans ruled:

> I'm enclosing [sic] the restitution of $64.99. You'll need to be responsible for a $500.00 victim assessment fee and also the $100.00 DNA collection fee. All other fees are waived and I've stricken those.

RP 10; CP 19-30.

Mr. Mathers appealed, seeking relief from the remaining legal financial obligations. CP 32-44. Although the Court of Appeals recognized the oppressive effects that legal financial obligations have on

[4] State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015).

an indigent defendant, it affirmed the trial court's imposition of legal financial obligations on Mr. Mathers in a published opinion.

Mr. Mathers now seeks review in this Court pursuant to RAP 13.4(b)(1), (3) and (4).

D. ARGUMENT

This Court should review the statutory and constitutional questions presented by a trial court's imposition of deoxyribonucleic acid (DNA) and Victim Penalty Assessment (VPA) fees on indigent offenders contrary to this Court's decision in Blazina.

This Court should review the opinion of the Court of Appeals, which concluded that a sentencing court's imposition of a $100 deoxyribonucleic acid (DNA) fee[5] and a $500 Victim Penalty Assessment (VPA) fee[6] is mandatory and failure to inquire into a defendant's particular ability to pay did not constitute an error, violate equal protection, or violate due process.

The legislature has plainly mandated that a sentencing court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them."[7] This Court recently confirmed this by "hold[ing] that a trial court has a statutory obligation to make an individualized inquiry into a

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[5] RCW 43.43.7541.
[6] RCW 7.68.035.
[7] RCW 10.01.160(3).

defendant's current and future ability to pay before the court imposes LFOs."[8]

1. The Court of Appeals misapprehended the scope of this Court's holding in Blazina, that a trial court has an obligation to make an individualized inquiry before imposing "LFOs."

In Blazina, this Court repeatedly described its holding as applying to "LFOs," not simply to a particular cost. See Blazina, 182 Wn.2d at 830 ("we reach the merits and hold that a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs."); id. at 839 ("We hold that RCW 10.01.160(3) requires the record reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs."); id.at 686-87 (Fairhurst, J. Concurring) ("I agree with the majority that RCW 10.01.160(3) requires sentencing judges to take a defendant's individual financial circumstances into account and make an individual determination into the defendant's current and future ability to pay."). Furthermore, when listing the LFOs imposed on the two defendants at issue, the court cited, *inter alia*, the same LFOs Mr. Mathers challenges here: the VPA[9] and DNA fees.[10] It

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[8] Blazina, 182 Wn.2d at 830.
[9] RCW 7.68.035.
[10] Id. at 831-32.

appears, therefore, that the Court did not intend to limit the scope of its holding to only a few of the LFOs imposed on those defendants. The Court should accept review because the Court of Appeals decision conflicts with this Court's decision in Blazina. RAP 13.4(b)(1).

2. Public policy supports an individualized inquiry before imposing any LFOs including DNA and VPA fees.

This Court's holding in Blazina, that a trial court must inquire into a defendant's current and future ability to pay LFOs was based on sound public policy. Because DNA and VPA fees are part of the state's LFO scheme, the same exact policy implications are relevant here. See RAP 13.4(b)(4) (review proper for matters of substantial public interest). Imposing LFOs on indigent defendants causes significant problems, such as "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration."[11] To begin, many defendants cannot afford the high LFO fees and either do not pay at all or contribute small amount every month.[12] It is very possible that a

[11] Id, 182 Wn.2d at 836.

[12] Id, 182 Wn.2d at 836 citing Katherine A. Beckett, Alexes M. Harris & Heather Evans, Wash. State Minority & Justice Comm'n, The Assessment and Consequences of Legal Financial Obligations in Washington State (2008) (Wash. State Minority & Justice Comm'n), available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

person who manages to pay $25 per month towards their LFOs[13] will owe *more* to the state 10 years after the conviction than when the LFOs were initially imposed.[14] Thus, because the state charges fees when LFOs are not paid on time and also charges interest on outstanding LFOs at a rate of 12 percent, many indigent persons are unable to actually pay off the LFO sums.[15]

Because the court maintains jurisdiction over someone until they completely pay off their LFOs,[16] the inability of the indigent to pay off LFOs means that the courts will continue to retain jurisdiction over them

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[13] The Judgment and Sentence of Mr. Mathers directed that:

> All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth a rate [sic] her: not less than $25.00 per month commencing _____. RCW 9.94A.760.
>
> The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information requested. RCW 9.94.A.760(7)(b). CP 25.

[14] Blazina, 182 Wn.2d at 836.

[15] Id..

[16] Id. at 836-37 citing Wash. State Minority & Justice Comm'n, supra note 7, at 9-11; RCW 9.94A.760(4) ("For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender for the purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime.").

long after their release.[17] The court's long-term involvement in defendants' lives inhibits reentry because background checks will show an active record in the superior court for those who have not fully paid off their LFOs,[18] which can have serious negative consequences on employment, on housing, and on finances.[19] These problems almost inexorably lead to increased recidivism.[20] Therefore, a holding that the trial court should not conduct an individualized inquiry into a defendant's ability to pay the DNA and VPA fees not only violates the plain language of RCW 10.01.160(3), but also contravenes the purposes of the Sentencing Reform Act, which includes facilitating rehabilitation and preventing reoffending.[21]

3. Older caselaw that the Court of Appeals relied upon conflicts with Blazina.

The Court of Appeals erroneously relied on outdated caselaw in holding that the trial court should not conduct an individualized inquiry into a defendant's ability to pay the DNA and VPA. However, these cases

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[17] Blazina, 182 Wn.2d at 836.

[18] Blazina, 182 Wn.2d at 837 citing Am. Civil Liberties Union, In For A Penny: The Rise of America's New Debtors' Prisons (2010) (ACLU), available at https://www.aclu.org/files/assets/InForAPenny_web.pdf.

[19] Blazina, 182 Wn.2d at 837.

[20] Id.

[21] See RCW 9.94A.010.

no longer control following the shift of "the doctrinal tectonics"[22] by this Court in State v. Blazina.[23]

The Court of Appeals' reliance on Curry is misplaced. Over twenty years ago the Court did state in Curry that the VPA was mandatory notwithstanding the defendant's inability to pay – but it addressed the question in the context of whether the VPA itself was unconstitutional, assuming the statute mandated imposition of VPA on both indigent and solvent offenders.[24] It said,

> The penalty is mandatory... in contrast to RCW 10.01.160, no provision is made in the statute to waive the penalty for indigent defendants.

Curry, 118 Wn.2d at 917 (citation omitted). The significance is unclear. First, that portion of the opinion is arguable dictum because it does not appear that the petitioners there actually argued that RCW 10.01.160(3) applies to the VPA and simply assumed that it did not. Second, Curry was effectively overruled by Blazina. In Curry, the Court analyzed the statute's constitutionality and determined it was constitutional because it had sufficient safeguards to prevent an indigent defendant from being

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[22] See State v Lyle, 188 Wn.App. 848, 854-55, 355 P.3d 327 (2015) (Bjorgen, J., dissenting).

[23] Blazina, 182 Wn.2d 827.

[24] State v. Curry, 118 Wn.2d 911, 829 P2d 775 (1983).

imprisoned simply because of indigency.[25] However, in Blazina the Court found that recent studies challenged the logic of Curry. For example, lack of imprisonment due to inability to pay[26] does not mean that defendants are afforded sufficient safeguards. The inability to pay off "LFOs means that courts retain jurisdiction over impoverished offenders long after they are released," which has "serious negative consequences" on the defendant's ability to gain employment, retain housing, and maintain stable finances.[27] As a result, the Court in Blazina held that "a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs."[28] Thus, the premise of Curry was rejected.

Blazina supersedes Lundy[29] and Blank[30] as well, both of which relied upon Curry. They should be reexamined now with the benefit of the Court's recent ruling in Blazina. The Court is well aware of the need for reform in the LFO system[31] and clearly ruled that "a trial court has a

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[25] Curry, 118 Wn.2d at 918.

[26] Id. ("[N]o defendant will be incarcerated for his or her inability to pay the penalty assessment unless the violation is willful.").

[27] Blazina, 182 Wn.2d at 836-37.

[28] Id. at 830.

[29] State v. Lundy, 176 Wn.App. 96, 308 P.3d 755 (2013).

[30] State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997).

[31] See Blazina, 182 Wn.2d. at 835 (stating that there are "National and local cries for reform of broken LFO systems").

statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs."[32] The Court of Appeals opinion conflicts with this Court's controlling precedent. See RAP 13.4(b)(1).

4. The clear implication in Blazina was that the VPA and DNA statutes must be read in tandem with RCW 10.01.160.

The Court of Appeals erroneously concludes that RCW 10.01.160 should not be read in conjunction with DNA[33] and VPA[34] statutes and that the trial court should impose these fees without regard to indigency. However, the clear implication of this Court's holding in Blazina was that the VPA and DNA statutes must be read in tandem with RCW 10.01.160, just like other LFOs.[35] It provides that a sentencing court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them."[36] This requires courts to conduct an inquiry into a defendant's financial status and refrain from imposing costs on those who cannot pay.[37] Read together, these statutes mandate the imposition of VPA and DNA fees on those who are able to pay, and requires a court not to order

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[32] Id. at 830.
[33] RCW 43.43.7541.
[34] RCW 7.68.035.
[35] Blazina, 182 Wn.2d. at 838.
[36] RCW 10.01.160(3).
[37] Blazina, 182 Wn.2d at 838.

indigent defendants such as Mr. Mathers to pay.

The Court of Appeals also erroneously concluded that because the legislature did not previously act to correct these decisions, it supported these previous interpretations. However, the legislature did act by writing the law without an explicit revocation of the Court's discretion to review a defendant's current and future ability to pay before the court imposes LFOs.[38] It was then *this* Court that corrected previous interpretations of the LFO doctrine through its holding in Blazina. The Court Appeals opined that the legislature intended the statute to be both punitive and compensatory but did not intend either the DNA or VPA to be punitive. The Court concluded that because of this, the statutes are separate and cannot be read together. However, the restitution, DNA, and VPA statutes all have the same effect in that they all impose financial burdens on those convicted and in turn work to lessen the state's own financial burden. For

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[38] Compare the explicit revocation of the Court's discretion in RCW 9.94A.753 ("the court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount.") (emphasis added) with the lack of explicit revocation in the DNA statute (RCW 43.43.7541) ("Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered [LFO] as defined in RCW 9.94A.030 and other applicable law.") and the VPA statute (RCW 7.68.035(1)(a)) ("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.").

example, the VPA is imposed "When any person is found guilty in any superior court of having committed a crime"[39] regardless of whether there is or is not actually a victim. Furthermore, all of the statutes have "serious negative consequences" on the lives of the indigent.[40] Thus, the restitution, DNA, and VPA schemes are part of an integrated scheme to shift the state's financial burdens and have the same effects on defendants. Because the legislature intended each of these statutes to be part of the same statutory scheme and because they have the same exact effects, they must be read together.

5. The Court of Appeals misapprehended the significance of Rule 34's support of the application of RCW 10.01.160.

In Blazina, this Court urged trial courts in criminal cases to reference GR 34 when determining their ability to pay.[41] The Supreme Court adopted GR 34 in 2010 and it supports a broad application of RCW 10.01.160. It states in part,

> Any individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief from a judicial officer in the applicable trial court.[42]

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[39] RCW 7.68.035(1)(a).
[40] Blazina, 182 Wn.2d at 837.
[41] Blazina, 182 Wn.2d at 838.
[42] GR 34(a)

This rule "allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status."[43]

In examining the rule's comment, the Court of Appeals concluded that this is meant to only provide indigent people with access to courts.[44] However, in doing so, the Court focuses on the latter clause of the comment, ignoring the former clause, which says that there is a "constitutional premise that every level of court has the inherent authority to waive payment of filing fees and surcharges on a case by case basis."[45] Thus, the rule's goal is part of a broader movement by the Court that recognizes a need to waive fees for indigent people engaging with the judicial system after conducting a determination of an ability to pay.

In Jafar v. Webb,[46] the Court applied GR 34(a) to a mother who filed an action to obtain a parenting plan and was seeking to waive all fees based on indigence.[47] The Court noted that both the plain meaning and history of GR 34, as well as principles of due process and equal protection, required courts to waive all fees for indigent litigants.[48] This

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[43] Blazina, 182 Wn.2d at 838.
[44] Court of appeals at 9
[45] GR 34 cmt.
[46] Jafar v. Webb, 177 Wn.2d 520, 303 P.3d 1042 (2013).
[47] Id. at 522.
[48] Id. at 527-30.

was despite the fact that the statutes at issue, like those at issue here, appear to mandate that the fees and costs "shall" be imposed.[49] Although GR 34 and Jafar deal specifically with indigent civil litigants having access to courts, the same principles are applicable here.

6. Equal Protection is violated.

The Court of Appeals found no equal protection[50] violation. however, there are several fundamental rights at issue and treating the DNA and VPA fees as mandatory violates the United States Supreme Court's holding in Fuller v. Oregon.[51] See RAP 13.4(b)(3) (review proper for a significant question of constitutional law).

First, there are several fundamental rights that are violated when a court imposes LFO costs on indigent defendants. The state is systemically creating a permanent underclass of people unable to fully exercise their constitutional liberties. "For three quarters of the cases sentenced in the first two months of 2004, less than 20 percent of the LFOs had been paid three years after sentencing."[52] As noted above. it is possible that a person

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[49] See RCW 36.18.020.

[50] U.S. CONST. amend XIV, § 1.

[51] Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974).

[52] Blazina, 182 Wash.2d 827 at 837 citing WASH. STATE MINORITY & JUSTICE COMM'N, supra note 7.

who manages to pay even $25 per month towards their LFOs will still owe *more* to the state 10 years after the conviction than when the LFOs were initially imposed.[53] Because the court maintains jurisdiction over someone until they completely pay off their LFOs,[54] the inability of the indigent to pay off LFOs means that the courts will continue to retain jurisdiction over them long after their release.[55] If they are never able to pay off their LFOs then they would remain under the jurisdiction of the courts forever. This would have serious negative consequences on their ability to function in society[56] and prevents them from fully exercising their fundamental right to live without being made a permanent ward of the state.

Furthermore, there is no rational purpose for the state to impose fees on indigent defendants who cannot pay. After all, "the state cannot collect money from defendants who cannot pay" and this "obviates one of

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[53] Blazina, 182 Wn.2d at 836.

[54] Blazina, 182 Wn.2d at 836-37 citing WASH. STATE MINORITY & JUSTICE COMM'N, supra note 7, at 9-11; RCW 9.94A.760(4) ("For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender for the purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime.").

[55] Blazina, 182 Wn.2d at 836.

[56] Blazina, 182 Wn.2d at 837 citing AM. CIVIL LIBERTIES UNION, supra note 18 at 68-69 .

the reasons for courts to impose LFOs."[57] This creates a permanent underclass that lives under the direction of the courts.[58] As a result, the state creates a subordinate a class of people, permanently disempowered from exercising basic constitutional rights, and the application of the fees at issue on indigent persons cannot survive equal protection.

Ultimately, treating the DNA and VPA costs as non-waivable would be constitutionally suspect under Fuller v. Oregon. There the Supreme Court noted that a consideration of ability to pay before imposing costs was required and that no cost could be imposed upon those who would never be able to repay them.[59] Thus, under Fuller, the Fourteenth Amendment[60] is satisfied if RCW 10.01.160(3) is read in tandem with the specific costs and fees statutes, by considering the ability to pay before imposing LFOs.

7. Substantive Due Process is violated where courts impose financial obligations on those unable to pay.

The Court of Appeals held there was no substantive due process violation, however, the state has created a class of people

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[57] Blazina, 182 Wn.2d at 838 citing RCW 9.94A.030.

[58] See Blazina, 182 Wn.2d at 838 (stating, "The court's long-term involvement in defendants' lives inhibits reentry: legal or background checks will show an active record in superior court … this active record can have serious negative consequences").

[59] Fuller, 417 U.S. 45-46.

[60] U.S. CONST. amend XIV, § 1.

that are under the permanent jurisdiction of the state, depriving them of their liberty in violation of their substantive due process rights. See RAP 13.4(b)(3).

The Court of Appeals relies on Curry, which this Court effectively overruled in Blazina, to determine that because no defendant will be "incarcerated for his or her inability to pay" that there is no violation of substantive due process.[61] Nevertheless, simply because a person is not physically "incarcerated" does not mean that due process is satisfied.

Both the Federal Constitution and the Washington State Constitution mandate that no person may be deprived of life, liberty, or property without due process of law.[62] Substantive due process "requires that 'deprivations of life, liberty, or property be substantively reasonable' or 'supported by some legitimate justification.'"[63]

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[61] Curry, 118 Wn.2d at 918.

[62] U.S. CONST. amends. V, XIV, § 1; CONST. art. I, § 3.

[63] Nielsen v. Washington State Dep't of Licensing, 177 Wash. App. 45, 309 P.3d 1221 (2013) quoting Russell W. Galloway, Jr., Basic Substantive Due Process Analysis, 26 U.S.F. L. REV. 625, 625-26 (1992).

Here the state has acted to systematically deprive many indigent people of their liberty without a legitimate justification. Again, "the state cannot collect money from defendants who cannot pay" and this "obviates one of the reasons for courts to impose LFOs."[64] It is "implicit in the concept of ordered liberty"[65] that the citizens in a democratic society cannot be permanent wards of the state. Nevertheless, the state is acting to place indigent persons permanently under the jurisdiction of the courts, in violation of their due process rights.

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[64] Blazina, 182 Wn.2d at 838 citing RCW 9.94A.030.

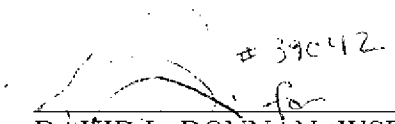
[65] Palko v. State of Connecticut, 302 U.S. 319, 325, 58 S. Ct. 149, 152, 82 L. Ed. 288 (1937) overruled by Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

E. CONCLUSION

This Court should grant review because the published Court of Appeals opinion contradicts this Court's decision in Blazina, raises significant questions of constitutional law and affects the substantial public interest by approving the imposition of costs against indigent defendants.

DATED this 9th day of June, 2016.

Respectfully submitted:



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APPENDIX

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Washington State
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Division Two

May 10, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANDREW PATRICK MATHERS, Appellant.	No. 47523-5-II PUBLISHED OPINION

MELNICK, J. — To an indigent defendant saddled with legal financial obligations (LFOs), it does not matter if the LFOs are labeled mandatory or discretionary. The effects on the indigent defendant remain the same. However, until there are legislative amendments or Supreme Court changes in precedent, we must recognize these distinctions and adhere to the principles of *stare decisis*.

Andrew Mathers appeals from the trial court's imposition of mandatory LFOs. He argues that the trial court's failure to inquire into his particular ability to pay a $100 deoxyribonucleic acid (DNA) fee and a $500 Victim Penalty Assessment (VPA) fee constituted error, violated equal protection, and violated due process. We affirm the trial court.[1]

[1] Because of our resolution above, we also conclude the trial court did not err by failing to conduct an individualized inquiry into Mathers's ability to pay DNA and VPA fees.

FACTS

After the State amended Mathers's original charge to theft in the second degree. Mathers entered a plea of guilty. At sentencing Mathers cited to *Blazina*[2] and objected to the imposition of LFOs. The trial court imposed $64.99 in restitution. The court also imposed a $100 DNA fee and a $500 VPA fee. The court waived all other LFOs. Mathers appeals.

ANALYSIS

I. APPLICABLE LAW

"The sentencing court's authority to impose court costs and fees is statutory." *State v. Cawyer*, 182 Wn. App. 610, 619, 330 P.3d 219 (2014); RCW 10.01.160(3). DNA[3] and VPA[4] fees are authorized by the legislature. A trial court may impose attorney fees and other costs on a convicted defendant if he or she is able to pay, or will be able to pay. RCW 10.01.160(3); *State v. Eisenman*, 62 Wn. App. 640, 644, 810 P.2d 55, 817 P.2d 867 (1991).

The DNA collection fee statute states,

> Every sentence imposed for a crime specified in RCW 43.43.754 *must* include a fee of one hundred dollars. The fee is a court-ordered [LFO] as defined in RCW 9.94A.030 and other applicable law. For a sentence imposed under chapter 9.94A RCW, the fee is payable by the offender after payment of all other [LFOs] included in the sentence has been completed.

RCW 43.43.7541 (emphasis added).

The VPA statute states,

> 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 shall be in addition to any other penalty or fine

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

[3] RCW 43.43.7541

[4] RCW 7.68.035.

> imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor and two hundred fifty dollars for any case or cause of action that includes convictions of only one or more misdemeanors.

RCW 7.68.035(1)(a) (emphasis added).

II. THE MANDATORY NATURE OF DNA AND VPA FEES

Mathers argues the trial court mistakenly believed it was required to impose DNA and VPA fees without regard to Mathers's indigence. Mathers contends the DNA and the VPA statutes should be read together with RCW 10.01.160. He also argues that failure to consider his ability to pay violates the plain language of RCW 10.01.160(3) and the purpose of the Sentencing Reform Act of 1981.[5] We disagree.

A. Legislative Intent

Where the legislature has had time to correct a court's interpretation of a statute and has not done so, we presume the legislature approves of our interpretation. *See In re Postsentence Review of Smith*, 139 Wn. App. 600, 605, 161 P.3d 483 (2007). Washington courts have consistently held that a trial court need not consider a defendant's past, present, or future ability to pay when it imposes either DNA or VPA fees. *See State v. Curry*, 118 Wn.2d 911, 917-18, 829 P.2d 166 (1992) (VPA fees are mandatory notwithstanding defendant's ability to pay); *State v. Clark*, 191 Wn. App. 369, 374, 362 P.3d 309 (2015) (victim assessment, filing fee, and DNA collection fee are mandatory obligations not subject to defendant's ability to pay); *see also State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013); *State v. Kuster*, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013); *State v. Thompson*, 153 Wn. App. 325, 336, 223 P.3d 1165 (2009); *State v. Williams*, 65 Wn. App. 456, 460, 828 P.2d 1158, 840 P.2d 902 (1992).

[5] Ch. 9.94A RCW.

Washington courts consistently treat the DNA and the VPA statutes as separate and distinct from the discretionary LFO statute and the restitution statute. However, Mathers argues that when the legislature intends to revoke the court's discretion, it explicitly evinces its intent. For support, he cites the restitution statute which says, "The court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount." RCW 9.94A.753(4). Mathers contends that the absence of such obligatory language in the DNA and the VPA statutes shows the legislature's intent to grant courts discretion.

While it is true that cannons of statutory interpretation direct that where the legislature uses different language within a provision, a different intent is indicated, *see State v. Conover*, 183 Wn.2d 706, 712-13, 355 P.3d 1093 (2015), Mathers's application of this principle to the present case is flawed. First, Mathers cites *Conover*, 183 Wn.2d at 712-13, for the principle that "the legislature's choice of different language in *different* provisions indicates different legislative intent." Br. of Appellant at 7-8 (emphasis added). However, in *Conover*, the court interpreted one statute by comparing differing language in sections of that *same* statute. 183 Wn.2d at 712-13. The appropriate use of this interpretive tool is to compare the language within the same provision, or between amended versions of the same statute, but not between entirely different statutes. *See In re Parentage of K.R.P.*, 160 Wn. App. 215, 223, 247 P.3d 491 (2011) ("'Where a provision contains both the words "shall" and "may," it is presumed that the lawmaker intended to distinguish between them.'" (Quoting *Scannell v. City of Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435 (1982)); *see also State v. Roberts*, 117 Wn.2d 576, 585-86, 817 P.2d 855 (1991) (comparing the current and prior version of the same statute to define an ambiguous term).

Additionally, the legislature has given Washington courts no reasons to presume the restitution statute should be directly compared to discretionary court fees and costs statutes. In fact, "[t]he legislature's amendments to the restitution statute demonstrate that the legislature has consistently sought to ensure that victims of crimes are made whole after suffering losses caused by offenders and to increase offender accountability." *State v. Gonzalez*, 168 Wn.2d 256, 265, 226 P.3d 131 (2010). The restitution statute is intended to be both punitive and compensatory. *State v. Kinneman*, 155 Wn.2d 272, 279-80, 119 P.3d 350 (2005).

The legislative intent behind the restitution statute is separate and distinct from its intent regarding the DNA and the VPA statutes. The DNA fee "serves to fund the collection of samples and the maintenance and operation of DNA databases" and does not have a punitive purpose. *State v. Brewster*, 152 Wn. App. 856, 860, 218 P.3d 249 (2009). The VPA fee is also not punitive in nature. *See State v. Humphrey*, 139 Wn.2d 53, 62, 983 P.2d 1118 (1999) (an amendment to the VPA statute did not apply retroactively because it created a new liability, not a new penalty).

Mathers also acknowledges that the legislature did amend the DNA fee statute to remove consideration of "hardship." Br. of Appellant at 8 n.7. He argues, however, that the legislature did not include language explicitly removing discretion. "In 2002 the legislature enacted a statute requiring courts to impose a $100 DNA collection fee with every sentence imposed under chapter 9.94A RCW for certain specified crimes, 'unless the court finds that imposing the fee would result in undue hardship on the offender.'" *Thompson*, 153 Wn. App. at 336 (quoting former RCW 43.43.7541 (2002)). The legislature amended the language in 2008 to state only, "Every sentence . . . must include a fee of [$100]." *Thompson*, 153 Wn. App. at 336 (quoting former RCW

43.43.7541 (2008)"). Given the legislative history, there does not appear to be support for the importance Mathers places on the lack of express language removing discretion.

We disagree with Mathers's argument that the legislature clearly intended trial courts to have discretion when imposing DNA and VPA fees.

B. Case Law Precedent

Next, Mathers argues the Washington Supreme Court in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), "repeatedly described its holding as applying to 'LFOs,' not just to a particular cost." Br. of Appellant at 8. Mathers asserts *Blazina* clearly implicates that the DNA and the VPA statutes should be read in conjunction with RCW 10.01.160. However, this interpretation is overbroad. Although *Blazina* involved the appeal of LFOs including DNA and VPA fees, the court only reviewed discretionary LFOs. 182 Wn.2d at 831. The court listed all the LFOs imposed in Blazina's case but then stated, "The trial court, however, did not examine Blazina's ability to pay the *discretionary* fees on the record." *Blazina*, 182 Wn.2d at 831 (emphasis added). It also stated, "A defendant who makes no objection to the imposition of *discretionary* LFOs at sentencing is not automatically entitled to review." *Blazina*, 182 Wn.2d at 832 (emphasis added). Throughout the opinion, the court made clear that it was reviewing only discretionary LFOs. *Blazina*, 182 Wn.2d at 834-35, 837-38.

Mathers also argues that the Washington Supreme Court has never held that DNA fees are exempt from an ability to pay inquiry. He acknowledges that we made that holding in *Lundy*, 176 Wn. App. at 102-03, but contends we lacked the benefit of *Blazina* and should not now follow our own precedent. Although our Supreme Court has not explicitly held that DNA fees are exempt from the ability to pay inquiry, it has implicitly made such a holding. *Blazina* recognized the

[6] Later amendments in 2011 and 2015 do not impact our analysis.

distinction between mandatory and discretionary fees. *Accord State v. Stoddard*, 192 Wn. App. 222, 225, 336 P.3d 474 (2016) ("*Blazina* addressed only discretionary [LFOs]."). The Washington Supreme Court could have interpreted the statute to require trial judges to conduct an ability to pay inquiry before imposing the DNA fee; however, it did not.

Mathers also acknowledges that the Washington Supreme Court stated in *Curry*, 118 Wn.2d at 917-18, that VPA fees are mandatory notwithstanding a defendant's ability to pay. But he contends the opinion was issued 20 years ago and solely addressed the argument that the VPA statute was unconstitutional. Specifically, Mathers contends that the portion of the opinion that addressed whether an inquiry was necessary for the VPA fee is "arguable dictum" and superseded by *Blazina*. Br. of Appellant at 12.

In *Curry*, our Supreme Court considered appellants' appeals of VPA fees. 118 Wn.2d at 917. In doing so, the court distinguished the VPA fee from costs imposed under RCW 10.01.160 stating, "The penalty is mandatory. . . . In contrast to RCW 10.01.160, no provision is made in the statute to waive the penalty for indigent defendants." *Curry*, 118 Wn.2d at 917 (citation omitted). The court reasoned that the time for a defendant to contest a VPA fee on the basis of ability to pay was when the State sought payment. *Curry*, 118 Wn.2d at 917-18. The court analyzed the statute's constitutionality and determined that the statute had sufficient safeguards to prevent an indigent defendant from being imprisoned purely because of indigency. *Curry*, 118 Wn.2d at 918. The court stated, "[N]o defendant will be incarcerated for his or her inability to pay the penalty assessment unless the violation is willful." *Curry*, 118 Wn.2d at 918. The court's remarks that the VPA fee was mandatory and did not contain a provision on ability to pay like in RCW 10.01.160 were a part of the court's analysis. *Curry*, 118 Wn.2d at 917. *Curry* has not been superseded by *Blazina*, and it is applicable to the situation currently before us.

Mathers also argues *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997) (appellate costs statute addressed), should be abandoned because more recent studies disprove its logic. In *Blank*, the court, relying on *Curry*, again considered "whether, *prior* to including a repayment obligation in defendant's judgment and sentence, it is constitutionally necessary that there be an inquiry into the defendant's ability to pay, his or her financial resources, and whether there is no likelihood that defendant's indigency will end." *Blank*, 131 Wn.2d at 239. The court held, "[T]he Constitution does not require an inquiry into ability to pay at the time of sentencing. Instead, the relevant time is the point of collection and when sanctions are sought for nonpayment." *Blank*, 131 Wn.2d at 242.

Mathers's argument that we should not follow *Blank*, however, is beyond the purview of Washington's Court of Appeals. While it is clear that both our Supreme Court and this court are aware of a need to reform the LFO system, *see Blazina*, 182 Wn.2d at 835 (stating, "National and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case"), the Supreme Court has not yet overruled its opinions in *Curry* or *Blank*. A Washington Supreme Court decision is binding on all lower courts in the state. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006). Therefore, because neither *Curry* nor *Blank* have been overruled, we must follow the Supreme Court's directly controlling precedent.

Lastly, Mathers cites General Rule (GR) 34 as further support that a broader application of RCW 10.01.160 is required. The court rule, adopted in 2010, states,

> Any individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief from a judicial officer in the applicable trial court.

GR 34(a). The Supreme Court possesses rule-making authority. *State v. Templeton*, 148 Wn.2d 193, 212, 59 P.3d 632 (2002). The "[p]romulgation of state court rules creates procedural rights." *Templeton*, 148 Wn.2d at 212. Courts apply cannons of statutory interpretation when construing court rules. *State v. Robinson*, 153 Wn.2d 689, 692, 107 P.3d 90 (2005).

The court's intent in GR 34 is clear if not from the language of the rule then by the comment to the rule, in which the court wrote.

> The adoption of this rule is rooted in the constitutional premise that every level of court has the inherent authority to waive payment of filing fees and surcharges on a case by case basis. Each court is responsible for the proper and impartial administration of justice which includes ensuring that meaningful access to judicial review is available to the poor as well as to those who can afford to pay.

GR 34 cmt. The rule has a focused goal. It allows filing fees to be waived to provide indigent people with access to the courts. GR 34(a). It does not say that civil judgments against those who had fees waived cannot be enforced. *See* GR 34. So Mathers's comparison is misplaced. He attempts to equate the waiving of filing fees with the imposition of criminal costs. GR 34 does not illuminate our Supreme Court's intent to more broadly apply RCW 10.01.160. We decline to rely on GR 34 to deduce the Washington Supreme Court's or the legislature's intent behind the DNA and the VPA statutes, or RCW 10.01.160.

C. Constitutional Challenges

1. Equal Protection

Mathers further argues that GR 34 supports his position that to allow mandatory costs and fees to be waived for indigent civil litigants but not for criminal defendants violates equal protection.[7] We disagree.

The Fourteenth Amendment of the United States Constitution and article I, section 12 of the Washington State Constitution require that similarly situated persons receive similar treatment under the law. *Harmon v. McNutt*, 91 Wn.2d 126, 130, 587 P.2d 537 (1978). "'Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made.'" *In re Det. of Thorell*, 149 Wn.2d 724, 745, 72 P.3d 708 (2003) (quoting *Baxstrom v. Herold*, 383 U.S. 107, 111, 86 S. Ct. 760, 15 L. Ed. 2d 620 (1966)). Where the challenge does not involve a suspect class and the right at issue is not a fundamental right, we utilize the rational basis test. *State v. Scherner*, 153 Wn. App. 621, 648, 225 P.3d 248 (2009).

[7] Mathers also asserts that the court in *Blazina* "urged trial courts in criminal cases to reference [GR34] when determining ability to pay." Br. of Appellant at 10. In *Blazina*, the court advised trial courts to look to GR 34 for guidance when determining indigency for discretionary LFOs. 182 Wn.2d at 838-39. While what Mathers says is not incorrect, his attempt to use the information to support his argument is not supported. He appears to suggest that the inference from the language of *Blazina*, evinces the Supreme Court's intent that civil litigants and criminal defendants be compared and that GR 34 and RCW 10.01.160 be applied equivalently. There is no support for this contention in the opinion. *Blazina*, 182 Wn.2d at 838-39.

Rational basis review requires the existence of a legitimate governmental objective and a rational means of achieving it. *In re Det. of Turay*, 139 Wn.2d 379, 410, 986 P.2d 790 (1999). "To overcome the strong presumption of constitutionality, the classification must be purely arbitrary." *In re Det. of Ross*, 114 Wn. App. 113, 118, 56 P.3d 602 (2002). The burden falls on the party challenging the classification to show that the classification is arbitrary. *Ross*, 114 Wn. App. at 118.

Here, Mathers appears to be premising his argument on GR 34 being to civil litigants what RCW 10.01.160 is to criminal defendants. As a basic premise, this assertion is incorrect. Mathers cites to *Jafar v. Webb*, in which the Washington Supreme Court held, "GR 34 provides a uniform standard for determining whether an individual is indigent and further requires the court to waive all fees and costs for individuals who meet this standard." 177 Wn.2d 520, 523, 303 P.3d 1042 (2013). In *Jafar*, the court held the intent of GR 34 is to insure access to the courts for civil litigants through fee waivers. 177 Wn.2d at 527-29.

On the other hand, RCW 10.01.160 allows courts to recoup *some* of the expenses associated with the criminal prosecution of a criminal defendant. *See also Eisenman*, 62 Wn. App. at 644. GR 34 serves a different purpose still from DNA and VPA fees, which are imposed only after a conviction. The fees are meant to respectively fund the collection of biological samples and the maintenance and operation of DNA databases, and to increase funding for victim programs. *Brewster*, 152 Wn. App. at 860; RCW 7.68.035. Mathers fails to establish that civil litigants and criminal defendants are similarly situated individuals receiving disparate treatment.

Mathers also argues that treating DNA and VPA fees as mandatory violates equal protection under *Fuller v. Oregon*, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974). There the United States Supreme Court upheld the Oregon statute on which RCW 10.01.160 was based.

Curry, 118 Wn.2d at 915; *Fuller*, 417 U.S. 40. In that case, the Court reviewed non-mandatory costs accumulated from prosecuting a specific defendant. *Fuller*, 417 U.S. at 45. Mathers improperly relies on this case to demonstrate that the Fourteenth Amendment is only satisfied if RCW 10.01.160(3) is read in tandem with specific cost and fee statutes. *Fuller* asserts no such precedent. The case does not address mandatory cost and fee statutes. Following our Supreme Court precedent, we conclude the imposition of DNA and VPA fees on Mathers did not violate equal protection.

2. Substantive Due Process

Both the state and federal constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. CONST. amends. V, XIV, § 1; WASH. CONST. art. I, § 3. "'The due process clause of the Fourteenth Amendment confers both procedural and substantive protections.'" *Nielsen v. Dep't of Licensing*, 177 Wn. App. 45, 52, 309 P.3d 1221 (2013) (quoting *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006)). "Substantive due process seems to have been gradually adopted as the shorthand for individual rights which are not clearly textual." Stephen Kanter, *The Griswold Diagrams: Toward A Unified Theory of Constitutional Rights*, 28 CARDOZO L. REV. 623, 669 n.170 (2006). "Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." *Amunrud*, 158 Wn.2d at 218-19. "It requires that 'deprivations of life, liberty, or property be substantively reasonable' or 'supported by some legitimate justification.'" *Nielsen*, 177 Wn. App. at 53 (quoting Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 625-26 (1992)).

The level of review applied in a substantive due process challenge depends on the nature of the interest involved. *State v. Beaver*, 184 Wn. App. 235, 243, 336 P.3d 654 (2014), *aff'd*, 184 Wn.2d 321, 358 P.3d 385 (2015). If no fundamental right is involved, the proper standard of review is rational basis. *In re Det. of Morgan*, 180 Wn.2d 312, 324, 330 P.3d 774 (2014).

Due process precludes the jailing of an offender for failure to pay a fine if the offender's failure to pay was due to his or her indigence. *State v. Nason*, 168 Wn.2d 936, 945, 233 P.3d 848 (2010). Under certain circumstances, however, the State may imprison an offender for failing to pay his or her LFOs, such as if the offender is capable of paying but willfully refuses to pay or if the offender does not make a genuine effort to seek employment or borrow money in order to pay. *Nason*, 168 Wn.2d at 945. Due process requires the court to inquire into the offender's ability to pay, but the burden is on the offender to show nonpayment is not willful. *Nason*, 168 Wn.2d at 945. Therefore, "'[t]t is at the point of enforced collection . . . , where an indigent may be faced with the alternatives of payment or imprisonment, that he "may assert a constitutional objection on the ground of his indigency."'" *Curry*, 118 Wn.2d at 917 (quoting *State v. Curry*, 62 Wn. App. 676, 681-82, 814 P.2d 1252 (1991) (quoting *United States v. Pagan*, 785 F.2d 378, 381-82 (2d Cir.), *cert. denied*, 479 U.S. 1017 (1986)), *aff'd*, 118 Wn.2d 911).

Mathers argues his "substantive due process" rights were violated. Br. of Appellant at 11, but because the same issues have already been addressed unfavorably to Mathers by Washington courts, we disagree with him. In *Curry*, our Supreme Court held that the VPA statute did not violate due process because "no defendant will be incarcerated for his or her inability to pay the penalty assessment unless the violation is willful." 118 Wn.2d at 918. *Lundy* followed this precedent in the context of the DNA statute. 176 Wn. App. at 102-03. In that case, we stated, "[O]ur courts have held that these mandatory obligations are constitutional so long as 'there are

sufficient safeguards in the current sentencing scheme to prevent *imprisonment* of indigent defendants.'" *Lundy*, 176 Wn. App. at 102-03 (emphasis in original) (quoting *Curry*, 118 Wn.2d at 918); *see also Kuster*, 175 Wn. App. at 424-25 (relying on *Curry*, 118 Wn.2d at 917, and *Blank*, 131 Wn.2d at 241, to conclude DNA and VPA fees do not require an inquiry at the time of sentencing).

Because *Blazina*, 182 Wn.2d 827, did not change Washington case law regarding mandatory LFOs, and because Mathers does not assert any new arguments, instead rearguing issues that have been clearly addressed, we follow *Curry* and *Lundy* and conclude that the imposition of DNA and VPA fees did not violate Mathers's due process right.

We affirm the trial court.

Melnick, J.

We concur:

Johanson, P.J.

Sutton, J.

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