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SUPREME COURT

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Court of Appeals
Division III
State of Washington

SUPREME COURT NO. 94765-1

NO. 34398-7-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SCOTT GREGER,

Petitioner.

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

The Honorable Maryann C. Moreno, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Scott Howard Greger, the appellant below, seeks review of the appended decision of the Court of Appeals in State v. Greger, noted at 198 Wn. App. 1067, 2017 WL 1655768, No. 34398-7-III (May 2, 2017) following the denial of his motion for reconsideration on June 6, 2017.

B. ISSUES PRESENTED FOR REVIEW

1. Criminal defendants and civil litigants are similarly situated with respect to the purpose of court filing fees provided in RCW 36.18.020(2), which is to fund counties, regional and county law libraries, and the state general fund. Courts may waive filing fees for civil litigants, but the Court of Appeals has held that courts may not waive filing fees for criminal litigants. Given that there is no rational basis for this differential treatment, does the mandatory imposition of the $200 criminal filing fee violate equal protection?

2. Is the $200 criminal filing fee provided in RCW 36.18.020(2)(h) a discretionary LFO that can be appropriately waived in cases involving indigent defendants?

C. STATEMENT OF THE CASE

The State charged Greger with possession of a stolen motor vehicle and a jury convicted him. CP 1, 38; RP 256-58.

At sentencing the trial court opted to impose no discretionary legal financial obligations but imposed the $200 criminal filing fee in RCW 36.18.020(2)(h), ostensibly believing it was a mandatory obligation. CP 57.

Greger appealed. CP 43. Among other things, he argued that the $200 filing fee was not intended by the legislature to be a mandatory obligation and, therefore, trial courts should conduct ability-to-pay inquiries before imposing it. Br. of Appellant at 22-26.

The Court of Appeals held that the criminal filing fee was mandatory based on the fact that the legislature used the word "shall": "This language is mandatory. The clerk *shall collect* the fee and the defendant *shall be liable* for it. It is difficult to see how the legislature could be much clearer in its directive." Appendix at 4.

Greger moved for reconsideration, pointing out that the legislature could be much clearer in its directive that the $200 filing fee is mandatory. He based his arguments on the plain language of the statute, on the similar "shall be liable" language employed in a nonmandatory LFO statute, and on the differences between the language of RCW 36.18.020(2)(h) and other LFO statutes that are truly mandatory. Mot. for Reconsideration at 2-7.

Greger also raised an equal protection challenge to the criminal filing fee, asserting that criminal and civil litigants are similarly situated with respect to RCW 36.18.020 filing fees, yet civil litigants are permitted a

waiver of their filing fees based on indigency and criminal litigants are not. Mot. for Reconsideration at 7-10. Greger's counsel acknowledged his failure to include this argument in the opening brief given that he had not thought of the argument yet. Mot. for Reconsideration at 9. However, given the constitutional nature of the claim and RAP 1.2(a)'s stated preference to consider issues on their merits, Greger requested that the Court of Appeals consider the equal protection challenge. Mot. for Reconsideration at 9-10.

D. ARGUMENT IN SUPPORT OF REVIEW

1. THIS COURT SHOULD REVIEW WHETHER THE "MANDATORY" IMPOSITION OF THE $200 CRIMINAL FILING FEE VIOLATES EQUAL PROTECTION, GIVEN THAT SIMILARLY SITUATED CIVIL LITIGANTS ARE PERMITTED A WAIVER

Greger acknowledges he raised no equal protection claim against the $200 criminal filing fee until he moved for reconsideration in the Court of Appeals. Although the Court of Appeals declined to consider this argument, an equal protection violation is a constitutional error that may be raised for the first time when seeking the Washington Supreme Court's review. State v. McCullum, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983), rev'd on other grounds by State v. Camara, 113 Wn.2d 631, 639, 781 P.2d 483 (1989). As Greger explained in his motion for reconsideration, he didn't raise the issue sooner because his counsel had not thought of it yet. RAP 1.2(a) specifies that the rules of appellate procedure "will be liberally interpreted to promote

justice and facilitate the decision of cases on the merits." Greger should not have to forgo a constitutional argument because his attorney failed to think of it sooner. Consistent with RAP 1.2(a), this court should consider Greger's equal protection claim and grant review of this issue pursuant to RAP 13.4(b)(3) and (4).

"Under the equal protection clause of the Washington State Constitution, article [I], section 12, and the Fourteenth Amendment to the United States Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment." State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). When a fundamental right or constitutionally cognizable suspect class is not at issue, "'a law will receive rational basis review.'" Id. at 308 (quoting State v. Hirschfelder, 170 Wn.2d 536, 550, 242 P.3d 876 (2010)). No fundamental right or suspect class is at issue here, so a rational basis requires that the legislation and the differential treatment alleged be related to a legitimate governmental objective. In re Det. of Turay, 139 Wn.2d 379, 410, 986 P.2d 790 (1999).

The purpose of RCW 36.18.020 is the collection of revenue from filing fees paid by both civil and criminal litigants to fund counties, county or regional law libraries, and the state general fund. See RCW 36.18.020(1) ("Revenue collected under this section is subject to division

with the state under RCW 36.18.025 and with the county or regional law library fund under RCW 27.24.070 . . . ."). RCW 36.18.025 requires 46 percent of filing fee monies collected by counties to "be transmitted by the county treasurer each month to the state treasurer for deposit in the state general fund." RCW 27.24.070 requires that $17 or $7, depending on the type of fee involved, be deposited "for the support of the law library in that county or the regional law library to which the county belongs." Civil and criminal litigants who pay filing fees under RCW 36.18.020 are similarly situated with respect to the statute's purpose: their fees are plainly intended to fund counties, county or regional law libraries, and the state general fund.

Although similarly situated, criminal and civil litigants are treated differently without any rational basis for different treatment considering the purpose of RCW 36.18.020. Civil litigants may obtain waiver of their filing fees. The comment to GR 34 directly states as much:

> This rule establishes the process by which judicial officers may waive civil filing fees and surcharges for which judicial officers have authority to grant a waiver. This rule applies to mandatory fees and surcharges that have been lawfully established, the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief. These include but are not limited to legislatively established filing fees and surcharges (e.g., RCW 36.18.020(5)); . . . domestic violent prevention surcharges established pursuant to RCW 36.18.020(2)(b) . . . .

(Emphasis added.) Civil litigants have no constitutional right to access the courts. Criminal litigants do. Yet, according to State v. Gonzales, 198 Wn. App. 151, 154-55, 392 P.3d 1158 (2017), State v. Stoddard, 192 Wn. App. 222, 225, 366 P.3d 474 (2016), and State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013), criminal litigants cannot obtain the same waivers of filing fees that civil litigants can. Because there is no rational basis to treat criminal litigants differently than civil litigants under a statute whose purpose is to collect filing fees to fund the state, counties, and regional and county law libraries, interpreting and applying the RCW 36.18.020(2)(h) criminal filing fee as a nonwaivable, mandatory financial obligation violates equal protection. Given that this fee is treated as mandatory and imposed in many Washington counties, this court should grant review to address this constitutional question of substantial public interest pursuant to RAP 13.4(b)(3) and (4).

2. THIS COURT SHOULD GRANT REVIEW TO DETERMINE, ONCE AND FOR ALL, WHETHER THE $200 CRIMINAL FILING FEE IS DISCRETIONARY OR MANDATORY

RCW 36.18.020(2)(h) provides that a criminal defendant "shall be liable" for a $200 filing fee and that the clerk "shall collect" it. Divisions Two and Three of the Court of Appeals have held this statute imposes a mandatory obligation. Gonzales, 198 Wn. App. at 154-55; Stoddard, 192

Wn. App. at 225; Lundy, 176 Wn. App. at 102. None of these cases provides or even attempts any statutory analysis. These Court of Appeals decisions are incorrect. Greger asks this court to grant review pursuant to RAP 13.4(b)(4) to make an authoritative determination that the criminal filing fee provided in RCW 36.18.020(2)(h) is not mandatory.

a. The plain meaning of the word "liable" does not denote a mandatory obligation

By directing that a defendant be "liable" for the criminal filing fee, the legislature did not create a mandatory fee. The term "liable" signifies a situation in which legal liability might or might not arise. Black's Law Dictionary confirms that "liable" might make a person obligated in law for something but also defines liability as a "future possible or probable happening that may not occur." BLACK'S LAW DICTIONARY 915 (6th ed. 1990); see also WEBSTER'S THIRD NEW INT'L DICTIONARY 1302 (1993) (defining liable as "exposed or subject to some usu. adverse contingency or action : LIKELY"). Based on the meaning of the word liable—giving rise to a contingent, possible future liability—the legislature did not intend to create a mandatory obligation.

Opinions addressing this challenge have overlooked the plain meaning of the word "liable." But there is no difference in meaning between "shall be liable" and "may be liable," however. From mandatory liability a

mandatory obligation does not follow; rather, a contingent obligation does. Even if a person must be liable for some monetary amount, it does not mean that they must actually pay the monetary amount or that the liability cannot be waived or otherwise resolved. Again, liability is, by definition, something that might or might not impose a concrete obligation. The legislature's use of the word "liable" in RCW 36.18.020(2)(h) shows it intended the criminal filing fee to be discretionary. Only be overlooking the meaning of the word "liable" have Divisions Two and Three reached their contrary result.

b. The difference in language in other provisions of RCW 36.18.020(2) supports Greger's interpretation that "shall be liable" does not impose a mandatory obligation

The Court of Appeals has simplistically reasoned that because RCW 36.18.020(2) contains the word "shall," the legislature intended the criminal filing fee to be mandatory. This misapprehends that the "'plain meaning' of a statutory provision is to be discerned from the ordinary meaning of the language at issue as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005) (citing Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 10-12, 43 P.3d 4 (2002)). Greger's nonmandatory interpretation of

RCW 36.18.020(2)(h) is supported by the language of other provisions in the same statute.

The beginning of the statutory subsection reads, "Clerks of superior courts shall collect the following fees for their official services," and then lists various fees in subsections (a) through (i). With the exception of RCW 36.18.020(2)(h), the fees are listed directly without reference to the word "liable" or "liability." RCW 36.18.020(2)(a) ("In addition to any other fee required by law, the party filing the first or initial document in any civil action . . . shall pay, at the time the document is filed, a fee of two hundred dollars . . . ." (emphasis added)); RCW 36.18.020(2)(b) ("Any party, except a defendant in a criminal case, filing the first or initial document on appeal from a court of limited jurisdiction or any party on any civil appeal, shall pay, when the document is filed, a fee of two hundred dollars." (emphasis added)); RCW 36.18.020(2)(c) ("For filing of a petition for judicial review as required under RCW 34.05.514 a filing fee of two hundred dollars." (emphasis added)); RCW 36.18.020(2)(d) ("For filing of a petition for unlawful harassment under RCW 10.14.040 a filing fee of fifty-three dollars." (emphasis added)); RCW 36.18.020(2)(e) ("For filing the notice of debt due for the compensation of a crime victim under RCW 7.68.120(2)(a) a fee of two hundred dollars." (emphasis added)); RCW 36.18.020(2)(f) ("In probate proceedings, the party instituting such proceedings, shall pay at the

time of filing the first document therein, a fee of two hundred dollars." (emphasis added)); RCW 36.18.020(2)(g) ("For filing any petition to contest a will admitted to probate or a petition to admit a will which has been rejected, or a petition objecting to a written agreement or memorandum as provided in RCW 11.96A.220, there shall be paid a fee of two hundred dollars." (emphasis added)).

These other provisions of RCW 36.118.020(2), unlike RCW 36.18.020(2)(h), give a flat fee for filing certain documents or specify that a certain fee shall be paid. RCW 36.18.020(2)(h) is unique in providing only liability for a fee. "Just as it is true that the same words used in the same statute should be interpreted alike, it is also well established that when different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word." Simpson Inv. Co. v. Dep't of Revenue, 141 Wn.2d 139, 160, 3 P.3d 741 (2000); see also In re Pers. Restraint of Dalluge, 162 Wn.2d 814, 821, 177 P.3d 675 (2008) ("When the legislature uses different words in the same statute, we presume the legislature intends those words to have different meanings."). The Court of Appeals decisions conflict with these cases and this canon of statutory interpretation, warranting review under RAP 13.4(b)(1).

Because RCW 36.18.020(2)(h) contains the only provision in the statute where "liable" appears (in contrast to the other provisions that are

clearly intended as mandatory), it should be interpreted as giving rise to only potential liability to pay the fee rather than imposing a mandatory obligation.

c. RCW 10.46.190 provides that every person convicted of a crime "shall be liable to all the costs of the proceedings against him or her," yet all the costs of proceedings are obviously not mandatorily imposed in every criminal case

RCW 10.46.190 provides,

> Every person convicted of a crime or held to bail to keep the peace shall be liable to all the costs of the proceedings against him or her, including, when tried by a jury in the superior court or before a committing magistrate, a jury fee as provided for in civil actions for which judgment shall be rendered and collected. The jury fee, when collected for a case tried by the superior court, shall be paid to the clerk and applied as the jury fee in civil cases is applied.

(Emphasis added.) This statute plainly requires that any person convicted of a crime "shall be liable" for all the costs of the proceedings.

But, even though RCW 10.46.190 employs the same "shall be liable" language as RCW 36.18.020(2)(h), the legislature and this court have indicated that all costs of criminal proceedings are not mandatory obligations. Indeed, RCW 10.01.160(3) does not permit a court to order a defendant to pay costs "unless the defendant is or will be able to pay them." This court confirmed this in Blazina. 182 Wn.2d at 838-39 (holding that RCW 10.01.160(3) requires the trial court to make an individualized ability-to-pay inquiry before imposing discretionary LFOs). Even though a

defendant "shall be liable" for such costs, the legislature nonetheless forbids the imposition of such costs unless the defendant can pay. This signifies that the legislature's use of the phrase "shall be liable" does not impose a mandatory obligation but a contingent one. RCW 36.18.020(2)(h)'s criminal filing fee should likewise be interpreted as discretionary.

d. The legislature knows how to make LFOs mandatory and chose not to do so with the criminal filing fee

The language of RCW 36.18.020(2)(h) differs markedly from statutes imposing mandatory LFOs. The VPA is recognized as a mandatory fee, given that it states, "When a 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." RCW 7.68.035 (emphasis added). This statute is unambiguous in its command that the VPA shall be imposed.

The DNA collection fee is likewise unambiguous. It states, "Every sentence imposed for a crime specific in RCW 43.43.754[1] must include a fee of one hundred dollars." RCW 43.43.7541 (emphasis added). Like the VPA, there can be no question that the legislature mandated a $100 DNA fee to be imposed in every felony sentence.

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[1] RCW 43.43.754(1)(a) requires the collection of a biological sample from "[e]very adult or juvenile individual convicted of a felony . . . ."

RCW 36.18.020(2)(h) is different. It does not state that a criminal sentence "must include" the fee or that the fee "shall be imposed," but that the defendant is merely liable for the fee. Despite that the legislature knows how to create an unambiguous mandatory fee, which must be imposed in every judgment and sentence, the legislature did not do so in this statute.

This court recently acknowledged as much in State v. Duncan, 185 Wn.2d 430, 436 n.3, 374 P.3d 83 (2016), observing that RCW 36.18.020(2)(h)'s criminal filing fee had merely "been treated as mandatory by the Court of Appeals." That this court would identify those LFOs designated as mandatory by the legislature on one hand and then separately identify the criminal filing fee as one that has merely been *treated* as mandatory on the other hand strongly indicates there is a distinction. The post-Duncan Court of Appeals decisions holding the filing fee is mandatory do not address this point, placing them in conflict with Duncan. RAP 13.4(b)(1).

Given the contingent meaning of the word "liable," the Duncan court seemed to indicate that the meaning of the phrase "shall be liable" is, at best, ambiguous with respect to whether it imposes a mandatory obligation. Under the rule of lenity, RCW 36.18.020(2)(h) must be interpreted in Greger's favor. Jacobs, 154 Wn.2d at 601. To the extent that the Court of

Appeals decisions conflict with the rule-of-lenity precedent of this court, review is warranted under RAP 13.4(b)(1).

e. Judicial notice is appropriate that not all superior courts agree the criminal filing fee is mandatory

In several counties, including Washington's most populous, King, the $200 filing fee is always waived. Greger asks this court to take judicial notice of the variance in treatment of the criminal filing fee when determining whether to take review. "Judicial notice, of which courts may take cognizance, is composed of facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy and verifiable certainty." State ex rel. Humiston v. Meyers, 61 Wn.2d 772, 779, 380 P.2d 735 (1963). This court should consult any of the hundreds of judgments and sentences from criminal cases available in pending cases to establish that not all courts, counties, and judges agree that the $200 criminal filing fee is mandatory. Given the disparity, the mandatory or discretionary nature of the criminal filing fee presents an issue of substantial public interest that should be authoritatively determined by this court, once and for all. RAP 13.4(b)(4).

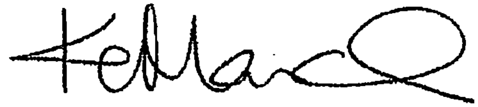
E. CONCLUSION

Because he meets the review criteria of RAP 13.4(b)(1), (3), and (4), Greger asks that this petition be granted.

DATED this 5th day of July, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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APPENDIX

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

STATE OF WASHINGTON, Respondent, v. SCOTT HOWARD GREGER, Appellant.	)	No. 34398-7-III UNPUBLISHED OPINION

KORSMO, J. — Scott Greger appeals from his conviction for taking a motor vehicle, challenging the standard reasonable doubt instruction and the imposition at sentencing of a $200 assessment for the criminal filing fee. He did not object to either of these actions at trial. Since the arguments are ones we have repeatedly rejected in recent months, we summarily affirm without significant discussion.

Unless the issue presents a manifest question of constitutional law, typically an argument cannot be raised on appeal if it was not presented to the trial court. RAP 2.5(a)(3). Thus, to present his challenge to the reasonable doubt instruction, which in this case followed standard WPIC 4.01, Mr. Greger must demonstrate that it is unconstitutional. He has not met that burden.

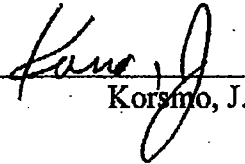
There is a long history of rejecting challenges to the standard reasonable doubt instruction. *See State v. Harras*, 25 Wash. 416, 421, 65 P. 774 (1901); *State v. Thompson*, 13 Wn. App. 1, 5, 533 P.2d 395 (1975). Challenges to modern formulations of the instruction repeatedly have been rejected in recent years. *State v. Kalebaugh*, 183 Wn.2d 578, 585-586, 355 P.3d 253 (2015); *State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007); *State v. Jenson*, 194 Wn. App. 900, 378 P.3d 270 (2016); *State v. Osman*, 192 Wn. App. 355, 375, 366 P.3d 956 (2016); *State v. Lizarraga*, 191 Wn. App. 530, 567, 364 P.3d 810 (2015); *State v. Kinzle*, 181 Wn. App. 774, 784, 326 P.3d 870 (2014); *State v. Fedorov*, 181 Wn. App. 187, 200, 324 P.3d 784 (2014). Although Mr. Greger emphasizes different language than that challenged in some of the earlier cases, merely challenging different language fails to address the context of the whole instruction. Mr. Greger's contention is without merit.

He also argues that the $200 criminal filing fee is discretionary and, therefore, the trial court was required to conduct an inquiry into his ability to pay it prior to imposing the fee. *See State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). This argument has been rejected before. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). RCW 36.18.020(2) mandates that the clerk of court "shall collect the following fees . . . (h) upon conviction or plea of guilty . . . an adult defendant in a criminal case shall be liable for a fee of two hundred dollars."

This language is mandatory. The clerk *shall collect* the fee and the defendant *shall be liable* for it. It is difficult to see how the legislature could be much clearer in its directive. The court did not err in imposing the $200 mandatory criminal filing fee.

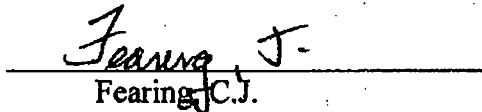
Affirmed.[1]

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.

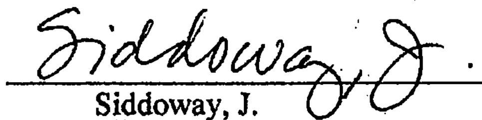


Korsmo, J.

WE CONCUR:



Fearing, C.J.



Siddoway, J.

[1] Mr. Greger having complied with our General Order concerning indigency and appellate costs, and the record revealing that he was on public assistance at the time of the offense and has significant debt, including previous legal financial obligations totaling nearly $20,000, we grant his request to waive appellate costs.

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State V. Scott Greger

No. 34398-7-III

Certificate of Service

On July 6, 2017, I e-served the petition for review directed to:

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Re: Greger
Cause No., 34398-7-III in the Court of Appeals, Division III, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

John Sloane
Office Manager
Nielsen, Broman & Koch

07-06-2017
Date
Done in Seattle, Washington

NIELSEN, BROMAN & KOCH P.L.L.C.

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