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Supreme Court No. 99765-9
(COA No. 81098-7-1)

THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL DEVINE,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Michael Devine, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Devine seeks review of the Court of Appeals decision dated April 12, 2021, a copy of which is attached to this petition as an appendix.

C. ISSUES PRESENTED FOR REVIEW

Did the legislature intend to impose a \$1,000 fine on persons who demonstrate their inability to ever pay the fine when they are convicted under RCW 9.68A.107?

D. STATEMENT OF THE CASE

At the time of his guilty plea, Mr. Devine entered into a largely agreed sentencing recommendation.¹ The parties agreed to contest the legal financial obligations, including whether a \$1,000 fine was mandatory, based on language

¹ Mr. Devine pleaded guilty to one count of possession of depictions of minor engaged in sexually explicit conduct in the first degree. RCW 9.68A.070; CP 9.

found in RCW 9.68A.107. RP 22, 25. When the trial court determined it could not waive this legal financial obligation, Mr. Devine appealed. The Court of Appeals held the legislature intended to make the \$1,000 fine mandatory but that the government could not use Mr. Devine’s social security benefits to satisfy the debt. App 1.

No one believed Mr. Devine could pay this fine. First, Mr. Devine demonstrated his frail health. RP 21. Mr. Devine is 75 years old and has been in decline since his diagnosis of idiopathic pulmonary fibrosis in 2004.² CP 33. Mr. Devine has shortness of breath and relies on a BiPAP machine for oxygen. *Id.*³ Mr. Devine also has hypertension, diabetes, sleep apnea, and gastroesophageal reflux disease. CP 33.

² Pulmonary fibrosis is a serious lung disease. Pulmonary fibrosis causes scar tissue to grow inside your lungs and makes it hard to breathe. It gets worse over time. WebMD, *Idiopathic Pulmonary Fibrosis (IPF)*. Available at <https://www.webmd.com/lung/what-is-idiopathic-pulmonary-fibrosis>.

³ BiPap is an acronym for “bilevel positive airway pressure” and describes a machine that pushes air into a person’s lungs. Johns Hopkins Medicine, *Health, BiPap*. available at <https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/bipap>.

Next, Mr. Devine established his inability to pay. Mr. Devine has not worked for about 15 years. RP 33. He relies on social security and Medicaid. RP 33. He has no other source of income. RP 34. He has no assets or savings. CP 55. He uses a wheelchair for mobility. CP 33.

At sentencing, Mr. Devine argued that the court could only impose the DNA and victim penalty assessment. RP 25. The court stated it lacked “enthusiasm” about imposing the \$1,000 fine but determined it had no choice but to impose the fine. RP 28, CP 38.

E. ARGUMENT

The Court of Appeals determined it did not have the authority to eliminate the \$1,000 fine imposed by the trial court under RCW 9.68A.107. App 5. Mr. Devine asks this Court to accept review of whether the legislature intended to impose this fine when there is no possibility he can pay this fine. Because whether fines can be imposed when there is no possibility they can be repaid is an issue of substantial public

interest that should be determined by this Court, Mr. Devine asks this Court to accept review. RAP 13.4(d).

The legislature did not intend to require trial courts to impose a mandatory fee on people unable to pay when in enacted RCW 9.68A.107.

A sentencing court “shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). Many defendants cannot afford the legal financial obligations ordered as part of their convictions and either pay only a small sum each month or do not pay them at all. *State v. Schwartz*, 194 Wn.2d 432, 443, 450 P.3d 141 (2019) (citing *State v. Blazina*, 182 Wn.2d 827, 836, 344 P.3d 680 (2015)). As a result, a defendant may owe LFOs for decades after being released from incarceration—sometimes even long after the statutory maximum sentence for the convicted offense has expired. Katherine A. Beckett et al., Wash. St. Minority & Just. Comm’n, *The Assessment And Consequences Of Legal Financial Obligations In Washington State* 22 (2008).

Before a trial court may impose a fine or fee, it must make an individualized inquiry into the defendant's current and future ability to pay. *Blazina*, 182 Wn.2d at 830.

Additionally, this court recognizes strict enforcement of the legal financial obligation statutes can violate state and federal law. *City of Richland v. Wakefield*, 186 Wn.2d 596, 607-08, 380 P.3d 459 (2016).

1. *Legislative intent does not require the trial court to impose a \$1,000 fee on persons too poor to pay when convicted of crimes under RCW 9.68A.107.*

When determining a statute's intent, this Court looks at the context of the statute and the words and provisions of related statutes. *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015). While RCW 9.68A.107 contains the word "shall," this statute should not be read to override the requirement that costs be imposed only when they can be paid.⁴ Instead, RCW 9.68A.107 must be read together with RCW 10.01.160, which requires courts to inquire about a

⁴ RCW 9.68A.107 states: "In addition to penalties set forth in RCW 9.68A.070, a person who is convicted of violating RCW 9.68A.070 shall be assessed a fee of one thousand dollars for each depiction or image of visual or printed matter that constitutes a separate conviction."

defendant's financial status and refrain from imposing costs on those who cannot pay. RCW 10.01.160(3); *Blazina*, 182 Wn.2d at 838. Contrary to the Court of Appeals, this Court should read RCW 9.68A.107 to allow a trial court to impose this fine when a person can pay it, but not on an indigent defendant like Mr. Devine. Read this way satisfies RCW 9.68A.107 and RCW 10.01.160(3).

Had the legislature intended RCW 10.01.160 not to apply, it would have used explicit language prohibiting a court from waiving the cost. *State v. Slattum*, 173 Wn. App. 640, 656, 295 P.3d 788 (2013). Where the legislature intends for no waiver of fines, it is clear. In the restitution statute, the legislature requires restitution to be ordered and states explicitly that "the trial 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.754(4). When the legislature's intent was not clear about DNA fees, it amended the statute to remove consideration of "hardship" when the fee is imposed, explicitly excluding it from

consideration under RCW 10.01.160(3). *Compare* RCW 43.43.7541 (2002) *with* RCW 43.43.7541 (2008).

The legislature also made clear its intent in eliminating waiver of the victim penalty assessment. The bill authorizing the assessment stated, “The crime victim penalty assessment under RCW 7.68.035 may not be reduced, revoked, or converted to community restitution hours.” Laws of 2018, ch. 269, §§ 8(5), 13(3)(f), 15(4)(f). It also stated, “An offender being indigent ... is not grounds for failing to impose ... the crime victim penalty assessment under RCW 7.68.035.” Laws of 2018, ch. 269, § 14(1).

No such limiting language exists in RCW 9.68A.107. Instead, the bill authorizing this fee states, “The legislature finds that additional funding sources are needed to ensure that law enforcement agencies can adequately investigate and prosecute offenders and victims can receive necessary services, including mental health treatment. Finally, the legislature finds that offenders convicted of crimes relating to child pornography should bear the high cost of investigations

and prosecutions of these crimes and also the cost of providing services to victims.” Laws of 2015, ch. 279, § 1. While the Court of Appeals is persuaded by this language that the legislature intended for this fine to be imposed regardless of ability to pay, no such words can be found here. Instead, the legislature recognizes those who commit this crime should bear the burden of its costs. This statement is not the same as saying the fine must be imposed when it conflicts with legislative intent to not impose most fines on persons who cannot pay. RCW 10.01.160(3).

Unlike the non-waiver language in other statutes, no such language exists in RCW 9.68A.107. Where the legislature omits language from a statute, intentionally or inadvertently, this Court will not read language into the statute it believes was omitted. *State v. Moses*, 145 Wn.2d 370, 374, 37 P.3d 1216 (2002). There is reason to believe the legislature intended for this statute to only apply to persons able to pay the fee. Certainly, the legislature could not have intended for the statute to apply to persons unable to pay this

fee, as the fee is intended to cover the costs of prosecution. Laws of 2015, ch. 279, § 1. *See, Slattum*, 173 Wn. App. at 656. Rather, it is likely the legislature relied on the language in RCW 10.01.160(3), which states a sentencing court “shall not order a defendant to pay costs unless the defendant is or will be able to pay them.”

This Court should accept review to examine whether, without language to the contrary, the legislature intended to impose a \$1,000 fee that cannot be collected. In accepting review, this Court should find the legislature intended to impose this fee only when a person has an ability to pay, something Mr. Devine will never be able to do. *Blazina*, 182 Wn.2d at 830; *State v. Ramirez*, 191 Wn.2d 732, 743-44, 426 P.3d 714 (2018).

2. *Mr. Devine is a terminally ill 75-year-old man who depends on social security disability payments.*

Unpaid and unpayable legal financial obligations can impose significant burdens on people with legal financial obligations and their families. Tarra Simmons, *Transcending the Stigma of a Criminal Record: A Proposal to Reform State*

Bar Character and Fitness Evaluations, 128 Yale L.J. Forum 759, 761 (2019).

Legal financial obligations are especially harmful to ill or disabled people like Mr. Devine. Legal financial obligations disproportionately affect disabled people who rely on social security. Individuals like Mr. Devine, with lifelong disabilities that prevent them from working, will never be able to pay off their legal financial obligations. This will result in a lifetime of hearings about the ability to pay legal financial obligations and all the other negative consequences of owing the government debt. *See* RCW 9.94A.760(8)(b). Adding additional barriers to a person like Mr. Devine only works to pose another obstacle he will never be able to overcome. Rebecca Vallas, *Ctr. For Am. Progress, Disabled Behind Bars: The Mass Incarceration of People with Disabilities in America's Jails and Prisons*, 3 (2016).⁵

⁵ Found online at <https://www.americanprogress.org/wp-content/uploads/2016/07/18000151/2CriminalJusticeDisability-report.pdf> [<https://perma.cc/GJ89-T7M8>].

Mr. Devine is not going to be able to pay this fee. Mr. Devine is a 75-year-old man who survives on social security and Medicaid. CP 33. He came to court in a wheelchair and uses oxygen to stay alive. RP 7; CP 33. He has no assets and depends on his children to be able to live. CP 34. His disease is terminal. RP 21; CP 33. He is unlikely to live long.

With this fee, Mr. Devine will spend the rest of his life, reliant on his children for transportation, trying to get to court or the clerk's office to seek a delay for the imposed fee. CP 38. This cannot be what the legislature intended. Instead, this Court should find that to satisfy legislative intent and due process, the trial court could waive the \$1,000 fee authorized by RCW 9.68A.107.

3. Because of Mr. Devine's poverty, this Court should accept review of whether the trial court had the authority to strike the \$1,000 fee.

“[A] debt must be capable of being paid, if it is not instead a lifetime [yoke] of servitude.” Loretta E. Lynch, U.S. Attorney General, *Remarks at White House Convening on*

Incarceration and Poverty (Dec. 3, 2015).⁶ The debt imposed on Mr. Devine will never be repaid. This Court must provide Mr. Devine with relief.

The trial court was right when it expressed its misgivings about imposing \$1,000 in additional costs at Mr. Devine's sentencing hearing that he will never be able to pay. RP 28. The court erred when it imposed the costs, despite Mr. Devine's evident inability to pay any future court debt. This Court should accept review of whether the fee as wrongly imposed.

F. CONCLUSION

Based on the preceding, Mr. Devine respectfully requests that review be granted pursuant to RAP 13.4 (b).

DATED this 31st day of July 2019.

Respectfully submitted,



TRAVIS STEARNS (WSBA 29335)
Washington Appellate Project (91052)

⁶ Found online at <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-white-house-convening-incarceration-and> [<https://perma.cc/XQ3T-49PK>].

APPENDIX

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Court of Appeals Opinion APP 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL B. DEVINE,

Appellant.

No. 81098-7-I

DIVISION ONE

UNPUBLISHED OPINION

SMITH, J. — This case involves questions of law with regard to an individual’s legal financial obligations (LFOs). Michael Devine pleaded guilty to first degree possession of depictions of a minor engaged in sexually explicit conduct. At sentencing, the trial court imposed, among others fees, a \$1,000 fee for possession of a sexually explicit photograph or video pursuant to RCW 9.68A.107. On appeal, Devine contends that the trial court erred in imposing the fee because he is indigent. He further asserts that his judgment and sentence must be amended to ensure that the government cannot collect Devine’s LFOs from his protected funds, including disability payments.

Because the \$1,000 fee is nondiscretionary, the court did not err in imposing it. However, because the court failed to add language limiting the State’s ability to collect Devine’s LFOs from his Social Security benefits, we remand to the trial court to correct the error.

FACTS

In April 2019, the State charged Devine with two counts of possession of

depictions of a minor engaged in sexually explicit conduct in the first degree. Devine pleaded guilty to one count of possession of depictions of a minor engaged in sexually explicit conduct in the first degree, and the State agreed to dismiss the second charge. In Devine's statement of defendant on plea of guilty, the State agreed to recommend that Devine serve "13 months in custody, pay \$500 victim penalty, \$100 DNA [(deoxyribonucleic acid)] fee, \$1,000 mandatory fine, and restitution," plus other conditions specific to sex offenders. Under the plea agreement, Devine could ask for a lesser sentence and for the court to waive the \$1,000 fine. The parties agreed that Devine was indigent but disagreed as to whether the \$1,000 fine was discretionary.

At sentencing, the court did not order restitution, and it waived court costs and recoupment. However, it imposed the \$100 DNA collection fee, the mandatory \$500 victim penalty assessment, and the \$1,000 fine "pursuant to RCW 9.68A.107." Orally, the court stated that Devine would not be required to use his Social Security payments to satisfy the LFOs. The order did not provide a limiting clause regarding the State's ability to collect LFO payments from Devine's Social Security earnings. Devine appeals.

ANALYSIS

RCW 9.68A.107

Devine contends that the trial court erred in imposing the \$1,000 fine under RCW 9.68A.107. Because the fine is nondiscretionary, we disagree.

We interpret a statute de novo. State v. Gonce, 200 Wn. App. 847, 855, 403 P.3d 918 (2017). And our primary objective is to give effect to the

legislature's intent. Gonce, 200 Wn. App. at 855. "We do not attempt to interpret a statute that is unambiguous, as we assume the Legislature means exactly what it says." State v. A.S., 116 Wn. App. 309, 312, 65 P.3d 676 (2003).

And "the Legislature's use of the word 'shall' in a statute is presumptively mandatory." A.S., 116 Wn. App. at 312.

Under RCW 9.68A.107(1), "a person who is convicted of violating RCW 9.68A.070 shall be assessed a fee of one thousand dollars for each depiction or image of visual or printed matter that constitutes a separate conviction."

RCW 9.68A.107(1) is unambiguous and leaves no discretion to the trial court. By stating that the court "shall" assess a \$1,000 fee on a person convicted of violating RCW 9.68A.070, the statute unambiguously requires that the court impose the fee in this situation. See A.S., 116 Wn. App. at 314-15 (holding that the statute stating that "the court shall not suspend . . . the . . . disposition" unless an exception applies, "unambiguously forbids the court from doing so in all" cases where an exception does not apply) (quoting RCW 13.40.160(7)). Like the legislative statements in RCW 7.68.035,¹ the legislative findings of Laws of 2015, ch. 279, § 1 make clear that a defendant convicted of possession of sexually explicit material of minors must pay the cost of investigation and prosecution of these crimes. Specifically, the enacting legislation states:

The legislature finds that due to a lack of dedicated resources, only two percent of known child exploitation offenders

¹ See, e.g., LAWS OF 2018, ch. 269, §§ 8(5) ("The crime victim penalty assessment under RCW 7.68.035 may not be reduced, revoked, or converted to community restitution hours.").

are being investigated. The legislature finds that additional funding sources are needed to ensure that law enforcement agencies can adequately investigate and prosecute offenders and victims can receive necessary services, including mental health treatment. Finally, the legislature finds that *offenders convicted of crimes relating to child pornography should bear the high cost of investigations and prosecutions of these crimes and also the cost of providing services to victims.*

LAWS OF 2015, ch. 279 § 1 (emphasis added). Accordingly, both the unambiguous language of RCW 9.68A.107(1) and the legislative findings require the imposition of the \$1,000 fine on every defendant convicted under RCW 9.68A.070. Therefore, the trial court did not err when it required Devine to pay the fine.

Devine disagrees and relies on RCW 10.01.160(3) and State v. Blazina² to support his assertion that the court cannot impose the fee on him, an indigent defendant. RCW 10.01.160(3) states that a court “shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent.” And Blazina acknowledged the limitations of this statute, highlighting that RCW 10.01.160(3) requires that the sentencing court consider a defendant’s “ability to pay the *discretionary fees.*” 182 Wn.2d at 831, 837-38 (emphasis added); State v. Ramirez, 191 Wn.2d 732, 744, 426 P.3d 714 (2018) (discussing Blazina’s instructions “for determining whether someone has an ability to pay discretionary costs”). As discussed above, the \$1,000 fine is nondiscretionary. Therefore, Devine’s assertion fails.

Devine also contends that a sentencing court “must look at the context of the statute and the words and provisions of related statutes.” To this end, he

² 182 Wn.2d 827, 344 P.3d 680 (2015).

contends that we should look to RCW 9.94A.753 and RCW 43.43.7541 as examples of when a court cannot waive a fee. In both statutes, the legislature explicitly stated that the at-issue fee was nonwaivable. RCW 9.94A.753(4) (“The court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount.”); RCW 43.43.7541 (“Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars unless the state has previously collected the offender’s DNA as a result of a prior conviction.”). However, we presume that the legislature’s use of “shall” is mandatory, whether or not the legislature provides an additional statement of nonwaivability. Therefore, Devine’s contention is unpersuasive.

Finally, Devine contends “[u]npaid and unpayable legal financial obligations can impose significant burdens on people with legal financial obligations,” in particular, for defendants with disabilities. We appreciate the struggles that will follow Devine’s inability to pay his court fines. However, the legislature was clear, and Devine’s crimes were not victimless.³ Thus, we are without authority to eliminate this mandatory LFO.

³ See, e.g., LAWS OF 2015, ch. 279 § 1 (“The legislature finds that sexual abuse and exploitation of children robs victims of their childhood and irrevocably interferes with their emotional and psychological development. Victims of child pornography often experience severe and lasting harm from the permanent memorialization of the crimes committed against them. Child victims endure depression, withdrawal, anger, and other psychological disorders. Victims also experience feelings of guilt and responsibility for the sexual abuse as well as feelings of betrayal, powerlessness, worthlessness, and low self-esteem. Each and every time such an image is viewed, traded, printed, or downloaded, the child in that image is victimized again.”).

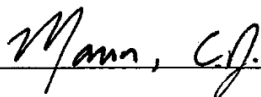
Social Security Benefits

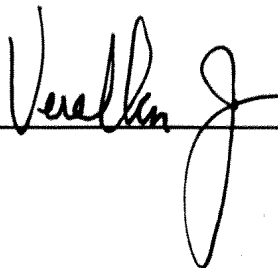
Devine asserts that the trial court erred when it failed to limit the State's ability to collect LFOs from his Social Security disability benefits, his only source of income. The State concedes that the court erred in not specifying the exemption in Devine's judgment and sentence. The Social Security antiattachment statute, 42 U.S.C. § 407(a), states that "none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process." That is, "no Social Security disability benefits are available to satisfy a debt," including Devine's mandatory LFOs. See State v. Catling, 193 Wn.2d 252, 264, 438 P.3d 1174 (2019) (concluding that the defendant was required to pay the \$500 victim fund assessment but that the debt could not be satisfied from their Social Security disability benefits). For this reason, we agree that the trial court erred.

Therefore, we affirm the imposition of the \$1,000 fine but remand to the trial court to amend the judgment and sentence to specify that the mandatory LFOs may not be satisfied out of any funds subject to the antiattachment statute.



WE CONCUR:





DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 81098-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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WASHINGTON APPELLATE PROJECT

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