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Division II  
State of Washington  
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**NO. 50316-6-II**

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**CHRISTOPHER BURTON,**

**Appellant.**

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**SUPPLEMENTAL RESPONDENT'S BRIEF**

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**I. ISSUE**

1. Should this Court remand this case to the trial court for the limited purpose of amending the judgment and sentence to strike improperly imposed legal financial obligations?

**II. SUPPLEMENTAL STATEMENT OF THE CASE**

The State agrees with and adopts the facts stated in Burton’s Supplemental Statement of the Case. *See* Suppl. Br. of Appellant at 2. The State seeks to highlight the following procedural facts: The trial court sentenced Burton on April 18, 2017, and his case remains on direct review before this Court. The legislature passed Engrossed Second Substitute House Bill 1783 (the Bill) on March 6, 2018, the Governor signed it on March 27, 2018, and the Bill took effect on June 7, 2018. *See* Laws of 2018, ch. 269, § 1783. The Washington Supreme Court interpreted the Bill when it decided *State v. Ramirez*, \_\_ Wn.2d \_\_, 426 P.3d 714 (2018) on September 20, 2018.

**III. SUPPLEMENTAL ARGUMENT**

- 1. This Court Should Strike the Filing Fee, Jury Fee, and Interest Provision of the Judgment and Sentence without Requiring Resentencing***

Burton argues that “this Court should strike the \$200 criminal filing fee, \$250 jury fee, \$100 DNA fee, and the interest provision of the judgment and sentence” based on the Bill and the Washington Supreme Court’s interpretation of the Bill in *Ramirez*.

As explained further below, the State agrees with Burton that based on the Bill and *Ramirez*, the Court should strike the \$200 criminal filing fee, the \$250 jury fee, and the interest provision of the judgment and sentence. However, because Burton has not demonstrated that he previously provided DNA to the state, the DNA fee should remain in Burton's judgment and sentence.

The Bill made several changes to Washington's legal financial obligation (LFO) scheme—the changes relevant to this case are discussed here. Regarding the clerk's filing fee, RCW 36.18.020(h) now provides that “upon conviction or plea of guilty . . . an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c).” Regarding the jury fee, a trial court shall not order a defendant to pay a jury fee “if the court finds that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c).” RCW 10.46.190; *see also* RCW 10.01.160. Regarding interest, “[a]s of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations.” RCW 10.82.090. Regarding the DNA fee, “[e]very 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." RCW 43.43.7541.

In order to have a DNA fee stricken from a judgment and sentence, a defendant must demonstrate in the record that he or she has not already given DNA to the state. *See State v. Thibodeaux*, \_\_ Wn. App. \_\_, \_\_ P.3d \_\_, 2018 WL 6174962 at \*3. Even if a defendant has prior felonies, "defendants do not always submit to DNA collection despite being ordered to do so." *Id.* Absent that showing, a court will reject a request to strike a DNA fee from a judgment and sentence." *Id.*

Here, the State agrees that based on the above cited changes in the law, this Court should strike the \$200 criminal filing fee, the \$250 jury fee, and the interest provision of Burton's judgment and sentence. Although these changes in the law took effect after the trial court sentenced Burton, recent Washington Supreme Court precedent provides that the fees should be stricken because Burton's case is not yet final under RAP 12.7. *See Ramirez*, 426 P.3d at 723 (holding that an indigent defendant is entitled to the benefits of the change in the law provided by the Bill when a defendant's case is on appeal as a matter of right and thus not final under RAP 12.7). Because Burton's case is similarly still on direct review, he receives the benefit of the change in the law provided by the Bill.

However, this Court should not strike the DNA fee. A defendant must demonstrate that he or she previously provided DNA to the state in order to avoid having a DNA fee imposed. *See* RCW RCW 43.43.7541; *Thibodeaux*, \_\_ Wn. App. \_\_ at \*3. In *Thibodeaux*, Thibodeaux argued that his DNA fee should be stricken because, among other arguments, “the State . . . previously collected his DNA.” *Id.* The Court of Appeals rejected Thibodeaux’s argument because he did not demonstrate in the record that he previously provided DNA to the state. *Id.* The Court of Appeals reasoned that although Thibodeaux had other felonies in his criminal history, “defendants do not always submit to DNA collection despite being ordered to do so.” *Id.* Accordingly, the Court of Appeals remanded Thibodeaux’s case for correction of certain aspects of his judgment and sentence, but it affirmed his sentence “[i]n all other respects.” *Id.*

Here, similar to *Thibodeaux*, the record is silent as to whether the State has previously collected Burton’s DNA, and Burton does not demonstrate otherwise. Thus, this Court should remand this case to amend the judgment and sentence to strike only the \$200 criminal filing fee, the \$250 jury fee, and the interest provision of Burton’s judgment and

sentence—resentencing is not required.<sup>1</sup> This Court should affirm Burton’s sentence in all other respects.

**IV. CONCLUSION**

For the above reasons, this Court should remand without resentencing to strike the improperly imposed LFOs but affirm Burton’s sentence in all other respects.

Respectfully submitted this 13<sup>th</sup> day of December, 2018.



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<sup>1</sup> The Washington Supreme Court in *Ramirez* similarly did not order resentencing, recognizing that the judgment and sentence could be amended without a full resentencing. *Ramirez*, 426 P.3d at 716, 723.

**CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on December 14<sup>th</sup>, 2018.

Michelle Sasser  
Michelle Sasser

**COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE**

**December 14, 2018 - 12:26 PM**

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