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Court of Appeals  
Division II  
State of Washington  
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NO. 51735-5-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

SAMMY WEAVER,

Appellant.

---

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

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REPLY BRIEF OF APPELLANT

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## A. INTRODUCTION

This Court should accept the State's concession and strike the filing fee in its entirety pursuant to the Washington Supreme Court's recent decision in *State v. Ramirez*. Additionally, this Court should strike the \$500 victim's penalty assessment (VPA) imposed under RCW 7.68.035(1)(a) as it violates Mr. Weaver's right to equal protection under the law. When read in conjunction with RCW 9A.52.070, RCW 7.68.035(1)(a) imposes different penalties for those convicted of the exact same criminal act based solely upon the court of conviction. While there may be a rational basis to order compensatory fines upon misdemeanor defendants, there is no basis to single out superior court defendants for this disparate treatment.

## B. ARGUMENT

1. This Court should strike the \$250 filing fee in its entirety as Mr. Weaver is indigent.

Mr. Weaver agrees with the State that the filing fee should be waived in its entirety as Mr. Weaver is statutorily indigent.<sup>1</sup> Mr. Weaver

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<sup>1</sup> John Hays initially represented Mr. Weaver on appeal and argued in Appellant's Opening Brief that the trial court exceeded its authority by imposing a \$250 filing fee. Appellant's Opening Brief at 1. The Washington Supreme Court published *State v. Ramirez* shortly before Mr. Hays filed the opening brief, which established that legislative changes eliminating the filing fee for indigent defendants applied to cases on direct appeal. Undersigned counsel initially planned to move to supplement the assignment of errors to address *Ramirez* as applied to Mr. Weaver's case. However, in the interests of judicial efficiency, Appellant requests this Court adopt the State's concession on this issue and strike the filing fee in its entirety.

additionally agrees with the facts regarding his financial status outlined in the State’s brief and supports the State’s interpretation of *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), as applied to Mr. Weaver’s case.

2. This Court should strike the victim penalty assessment fine as it violates Mr. Weaver’s constitutional right to equal protection.

*a. Review is warranted under RAP 2.5(a)(3)*

The violation of Mr. Weaver’s right to equal protection is a “manifest error affecting a constitutional right” that may be raised for the first time on review. RAP 2.5(a)(3). There is no doubt that an error involving an equal protection violation implicates a constitutional right. *E.g., State v. Hemming*, 121 Wn. App. 609, 90 P.3d 62 (2004) (equal protection challenge to age classification in child-rape reviewable under RAP 2.5(a)(3)). Moreover, the error was prejudicial to Mr. Weaver; he is currently indigent, is not incarcerated, and is required to continue to make payments on the fine over the next 14 months. As such, it is a manifest error warranting review.

*b. The imposition of the legal financial obligation violated equal protection.*

The State’s conclusory argument that, for equal protection purposes, the class at issue is comprised of everyone convicted of a crime in superior court misses the mark. *See* Brief of Respondent at 6. Equal protection requires that persons *similarly situated* under the law receive

like treatment. *State v. Simmons*, 152 Wn.2d 450, 458, 98 P.3d 789 (2004). For criminal defendants, “[t]o establish a similar situation, there must be near identical participation in the same set of criminal circumstances.” *State v. Rushing*, 77 Wn. App. 356, 359-60, 890 P.2d 1077 (1995) (defendant’s class defined as all individuals charged with both felony and misdemeanor DWIs) (internal quotation omitted); *State v. Handley*, 115 Wn.2d 275, 290, 796 P.2d 1266 (1990) (“if a defendant can establish that he or she is similarly situated with another defendant by virtue of near identical participation in the same set of criminal circumstances, then the defendant will have established a class of which he or she is a member”); *State v. Posey*, 130 Wn. App. 262, 270, 122 P.3d 914 (2005), *rev’d in part on other grounds in* 161 Wn.2d 638, 137 P.3d 560 (2007).

Correct identification of the class is critical in analyzing equal protection claims. *Posey*, 130 Wn. App. at 270. *State v. Posey* is instructive. In *Posey*, the court examined the constitutionality of the automatic decline provision of former RCW 13.04.030(1)(e)(v) granting adult criminal courts exclusive jurisdiction over certain serious offenses committed by juveniles. 130 Wn. App. at 270-72. Posey was charged with both an auto-decline offense (first degree assault) and an offense over which the juvenile court retained jurisdiction (second degree rape). *Id.* at 265. Posey was acquitted of the assault but convicted of the second degree

rape and sentenced to an indeterminate life sentence with a minimum of 115 months. *Id.* On appeal, he argued that the auto-decline statute violated his right to equal protection by allowing disparate treatment from those juveniles convicted of second degree rape in juvenile court. *Id.* The *Posey* Court identified the violation as hanging entirely on the question of Posey's defined class as either (1) juveniles charged in adult court with auto-decline offenses or (2) juveniles convicted in adult court of offenses not requiring automatic declination, only the latter of which arguably posed an equal protection violation. *Id.* at 271-72. The court rejected Posey's claim, finding that the plain language of the statute applied to cases where the "alleged offense" is an auto-decline offense and was thus not dependent on conviction. *Id.* at 271. Additionally, Mr. Posey's charge of first degree assault did not encompass a "near identical participation in the same set of criminal circumstances" as the facts or conduct in a second degree rape case. *Id.* at 271-72.

In this case, Mr. Weaver is similarly situated with other individuals convicted of criminal trespass in the first degree "by virtue of near identical participation in the same set of criminal circumstances." As in *Posey*, the plain language of the statute identifies the class, in this case those "convicted" of a gross misdemeanor. RCW 7.68.035(1)(a). Perhaps more importantly, Mr. Weaver engaged in the same criminal conduct as

those charged with committing criminal trespass, not burglary. Although allegedly entering without permission, there was no evidence that anything was stolen, broken, or that Mr. Weaver intended to commit a crime inside the apartment. Rather, the State's argument – which was clearly rejected by the jury – was that the burglary was based upon Mr. Weaver plugging in his phone and thereby intending to steal electricity. RP 138. Far from those in *Posey*, the facts of Mr. Weaver's case do not differ in any meaningful way from the facts of an individual convicted of criminal trespass in any Washington court.

Adopting the State's proposed definition of similarly situated individuals as anyone who has been convicted of a crime in superior court (as compared to those not convicted of a crime) would render the right to equal protection virtually meaningless. Washington courts have repeatedly found that the legislature has a rational basis in treating individuals with convictions differently, be it to promote public safety, to discourage criminal activity in school zones, or to fund victim services. *E.g. State v. Manussier*, 129 Wn.2d 652, 921 P.2d 473 (1996) (three strikes law rationally related to promoting public safety); *State v. Coria*, 120 Wn.2d 156, 839 P.2d 890 (1992) (sentencing enhancement for selling narcotics near a school bus stop rationally related to keeping drugs away from schoolchildren); *State v. Mathers*, 193 Wn. App. 913, 376 P.3d 1163

(2016) (imposing VPA on criminal defendants and not civil defendants rationally related to purpose to increase funding for victims of crime). The question for this Court, however, isn't whether it is rational for those convicted of offenses to pay a penalty, but rather whether it is rational that those convicted in superior court be singled out to pay an additional penalty of \$500 dollars when the criminal violation and underlying acts do not differ from those convicted in courts of limited jurisdiction.

It is well settled that “[t]he existence of two statutes which declare the same acts to be crimes, but penalize more severely under one than under the other, constitutes a denial of equal protection.” *State v. Sherman*, 98 Wn.2d 53, 61, 653 P.2d 612 (1982); *see also State v. Berrier*, 110 Wn. App. 639, 41 P.3d 1198 (2005) (statute imposing firearm enhancement for only certain offenders convicted under RCW 9A.190 violated defendant’s right to equal protection). Titled the “victim’s penalty assessment,” RCW 7.68.035(1)(a) clearly imposes a financial penalty. *See State v. Eisenman*, 62 Wn. App. 640, 646 n. 16, 810 P.2d 55 (RCW 7.68.035 is not directly connected with the costs of prosecution and is therefore not a recoupment statute). Read in conjunction with RCW 9A.52.070, RCW 7.68.035 penalizes the same criminal act of criminal trespass more severely if it is prosecuted in superior court. Yet, the fund into which the penalty is paid goes far beyond the costs of court

adjudication, including “comprehensive services to victims and witnesses,” outreach related to the fund, and assisting victims in presenting claims to the department of labor and industries. RCW 7.68.035(4). There is no rational basis to isolate superior court defendants to pay for these expansive services.

Respondent’s argument that the prosecutor in Mr. Weaver’s case had a valid reason to file in superior court does not save an otherwise discriminatory law. Brief of Respondent at 7. While the classification of RCW 7.68.035(1)(a) necessarily encompasses those *charged* in superior court, the penalty is specific to those *convicted* in superior court. Thus, even assuming the Respondent’s argument is correct that the filing decision may not have been arbitrary as applied to Mr. Weaver, the imposition of additional fines after charging and conviction remains unequal.

Mr. Weaver was *convicted* of a gross misdemeanor violation of RCW 9A.52.070. CP 260. Even if this Court finds that, when the case was initiated, Mr. Weaver’s class was those charged with a felony which includes a lesser, misdemeanor offense, once Mr. Weaver was convicted, his class membership changed – he became similarly situated with individuals convicted of a gross misdemeanor. More specifically, Mr. Weaver became part of a class of those convicted of criminal trespass in

the first degree under a set of facts that fits squarely into elements in RCW 9A.52.070. The imposition of the additional fine for the same criminal conduct is thus both facially invalid and invalid as applied to Mr. Weaver. It violated Mr. Weaver's right to equal protection under the law and this Court should strike the \$500 penalty.

**C. CONCLUSION**

For the above stated reasons, this Court should strike Mr. Weaver's \$750 legal financial obligations of the filing fee and the victim's penalty assessment.

DATED this 13<sup>th</sup> day of February, 2019.

Respectfully submitted,

s/Devon Knowles

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 51734-5-II
	)	
SAMMY WEAVER,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14<sup>TH</sup> DAY OF FEBRUARY, 2019, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION ONE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<p>[X] SAMMY WEAVER 4400 NE HURD RD BELFAIR, WA 98528</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

SIGNED IN SEATTLE, WASHINGTON THIS 14<sup>TH</sup> DAY OF FEBRUARY, 2019.



X \_\_\_\_\_

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# WASHINGTON APPELLATE PROJECT

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