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Court of Appeals  
Division III  
State of Washington

NO. 325491

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

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DAVID RANDALL PRIEST

APPELLANT,

V.

STATE OF WASHINGTON

RESPONDENT

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BRIEF OF RESPONDENT

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## **A. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. The defendant's assignments of error to the trial courts findings of fact (15, 17, and 20), are without any factual support and the findings were supported by substantial evidence. Should the trial courts findings of fact be binding on appeal?
2. No search warrant was necessary to view the information on the cellular phone that was abandoned in a place in which the defendant had no right to be and where he had no legitimate expectation of privacy. Additionally even if a privacy right could be legitimately asserted, the exceptions of plain view, open view, and community caretaking would operate to permit the officer to view the information. Should the claim of warrantless search be denied?
3. The prior tape recorded statement of Francis Edwards was properly admitted under ER 803(a)(5) and ER 613, where she lacked knowledge of the statement and where it was inconsistent with her testimony on cross exam denying contact with the defendant. Did the trial court abuse its discretion in admitting evidence under ER 803(a)(5) and/or ER 613?
4. The record on appeal is limited by RAP 9.1(a) to a report of the trial court proceedings, the papers filed with the Superior Court Clerk, and any exhibits admitted in the trial court proceedings. Matters referred to in a brief, but not included in the record, cannot be considered on appeal. Should the appendix material attached to Priest's brief be stricken, and

arguments related to those materials not be considered on appeal?

5. A person cannot challenge the constitutionality of a statute unless he or she is harmfully affected by the provisions alleged to be unconstitutional. Priest contends that RCW 43.43.7541 is unconstitutional as applied to those who lack the present or likely future ability to pay the mandatory \$100 DNA fee. The record does not establish that Priest is constitutionally indigent or is otherwise certain to lack the funds to pay the fee in the future. Does Priest lack standing to challenge the constitutionality of RCW 43.43.7541?
6. The constitutionality of a mandatory legal financial obligation imposed at sentencing is not ripe for review until the State attempts to collect payment or impose punishment for failure to pay. The State has not attempted to collect the mandatory DNA fee from Priest. Is his claim unripe, precluding review?
7. Under RAP 2.5, this Court may refuse to review any claim raised for the first time on appeal, including whether imposing mandatory legal financial obligations without consideration of the defendant's ability to pay is unconstitutional. Priest raised no objection to the DNA fee in the trial court and does not argue that any "manifest constitutional error" exists to justify review under RAP 2.5. Should this Court decline to review the issue?
8. Our supreme court has already held that a statute providing for payment of a mandatory fee does not violate substantive due process when there are sufficient safeguards to prevent imprisonment for a good-faith inability to pay. Such

safeguards exist with respect to the DNA fee. Has Priest failed to prove beyond a reasonable doubt that the DNA fee statute violates substantive due process as applied to indigent defendants?

9. The constitutional guarantee of equal protection requires that similarly-situated persons receive like treatment. Where legislation does not infringe on fundamental rights or create suspect classification, it will be upheld where there is a rational relationship between the means employed and a legitimate state goal. Priest has not established that persons who are convicted and sentenced only once and those who are convicted and sentenced multiple times are "similarly situated" for purposes of the DNA collection fee. Even if they are, the fee funds maintenance of a system that may be accessed every time an individual is prosecuted for a new crime; thus, there is a rational relationship between assessing the DNA fee each time the individual is sentenced and the legitimate state interest in funding the collection, analysis, and retention of offenders' DNA profiles. Has Priest failed to prove beyond a reasonable doubt that the DNA fee statute violates equal protection?

## **B. STATEMENT OF THE CASE**

1. Substantive facts pertaining to trial and sentencing

Harrell Meyers kept four ATV's in an enclosed car hauler trailer at his gated residence at 675 Bill Shaw Road, located between

Pateros and Twisp. RP 4/9/14, 22-225. The ATV's included a Honda, a Suzuki, a Bombardier, and a Polaris. RP 4/9/14, 224-25. The trailer also held a float boat, tools, ladders, and camping gear. RP 4/9/14, 225.

About two weeks prior to the theft of Mr. Meyers trailer, ATV's, and other equipment, Mr. Meyers observed the lock on his trailer had been cut off. RP 4/9/14, 226. He then double locked his trailer, before leaving his residence to travel to western Washington. RP 4/9/14,226. When Mr. Meyers returned to his residence around December 22, 2012, he noticed the lock on his gate was cut and the trailer was missing. RP 4/9/14, 227, 250. Deputy Laura Wright took the initial complaint from Mr. Meyers. RP 4/9/14, 250-51.

On February 4, 2013, Sheriff's Sgt. Harrison observed a Bombardier and Polaris ATV at the residence of Shelly Priest. RP 4/9/14, 253, 266, RP 4/10/14, 516-17. Ms. Priest is the ex-sister in law of the defendant. RP 4/9/14, 264. The residence was located in HUD housing on the Colville reservation. RP 4/9/14, 253. Sgt. Harrison took photos of the ATVs. RP 4/9/14, 254. Ms. Priest told Sgt. Harrison that the defendant had brought the ATVs to her

house, two to three weeks prior to Sgt. Harrison's arrival. RP 4/10/14, 517-18, 547.

Sgt. Harrison's photos of two of the ATVs sent to Mr. Meyers and identified as ones stolen from him. RP 4/9/14, 229-34, 254. However, by the time Mr. Meyers and law enforcement returned to Shelly Priest's residence, they had been moved. RP 4/9/14, 229-34, 300-301. Mr. Meyers then located his stolen Polaris ATV covered by a tarp at the nearby residence of Donna Priest (the defendant's mother) at the HUD site. RP 4/9/14, 236-37, 255, 269-70. Another ATV was located on Dayton Street in Omak. RP 4/9/14, 255. Shelly Priest advised law enforcement that the defendant and his friends had moved the ATVs; she also advised them of an address at 232 Greenacres Road where the defendant may be keeping items. RP 4/9/14, 301-02.

The stolen car hauler trailer was also located. RP 4/9/14, 256. It had been cut down so only the flatbed remained, and then sold. RP 4/9/14, 252-53, 256-258, 398, 401.

The remaining two ATVs were located on the property of Charles and Pearl Nodine on Summit Lake Road near Tonasket. RP 4/9/14, 261, 318-320. The Nodines acquired the ATVs after a

friend had put them in contact with "D.P.", whom they met at a residence at the HUD housing site. RP 4/9/14, 324-325, 344, 349, 357-58, 366, 389-391. The Nodines had arranged to pay \$1,500 for the ATVs, but only paid a total \$750 because they never received the titles. RP 4/9/14, 321, 327-328, 351, 353, 382, 385, 408. On February 23, 2013, the Nodines contacted Sheriff's Deputy Shrable because they believed the ATVs may be stolen. RP 4/9/14, 355-56, 387-88. Charles Nodine identified D.P. as David Priest. RP 4/9/14, 361, 366-67, 393-394.

Frances Edwards testified at trial. She testified that she was currently in jail, and testified to her prior criminal history. RP 4/9/14, 416. Ms. Edwards then testified that she did not have recollection about sending a note about information she had regarding that ATVs at the HUD; or about subsequently talking to Deputy Wright and providing a recorded statement; or meeting with the Prosecutor and Deputy Wright; or the details of those contacts. RP 4/9/14, 417-418. Outside the presence of the jury the state moved to have the court inquire of Ms. Edwards if she intended to testify or continue indicating she had no recollection; or the alternative to admit her statement through deputy Wright. RP 4/9/14, 418. The state pointed out that ER 613 was not yet applicable since Ms.

Edwards had not denied sending the note or making the statements. RP 4/9/14, 422.

With the courts permission, the state questioned Ms. Edwards on each question she had answered in her interview with Deputy Wright. RP 4/9/14, 425. To nearly every question, Ms. Edwards answered that she was not sure and/or did not recall. RP 4/9/14, 426-435.<sup>1</sup>

Ms. Edwards did testify on cross exam that she used methamphetamine and has PTSD and anxiety, but that she was not on any medications, and that she did not suffer from any hallucinations or delusions. RP 4/9/14, 435-36, 442. She testified she had problems remembering past events. RP 4/9/14, 436-437. However, she then testified to the nature and length of time in years she had the claimed anxiety and drug problems; where she lived in the past; her prior criminal history, etc.. RP 4/9/14, 437-38, 441-42. She also testified specifically that she did not discuss with the defendant about him having the ATVs at her house. RP 4/9/14,

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<sup>1</sup> Ms. Edwards did answer in the negative to a question about her son. RP 4/9/14, 430.

436.<sup>2</sup> She then again testified to having no recollection of the statements she provided to law enforcement. RP 4/9/14, 436, 440.

On redirect, Ms. Edwards continued to answer that she did not recall reviewing her taped statement, did not recall sending a note, or recall its contents. However, she did testify how long she knew the defendant, and who lived nearby her at her previous residence at the HUD site. RP 4/9/14, 443-44.

On April 10, 2014, the state move to admit Ms. Edwards' statement under ER 801 and alternatively ER 613. RP 4/10/14, 472. The state pointed out that the witness provided substantive testimony in addition to her testimony about lack of recollection.

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<sup>2</sup> However, in her recorded statement she stated "--as I was sitting there. And he said, "Can you" -- "Can I leave these here, because I got kicked out of my house." And so then I threw the dope back at him, and I said, "No," I said, "That don't work here," because I have a sweat out back where, you know, people come to heal and stuff...So I told him no, and I told him, "Can you give me some money?" And he said, "No," (inaudible), whatever that meant.... So then I told him, "Well, what is it?" And then I looked out and seen a red four-wheeler in the shed, and then the yellow -- one up by the deck. RP 4/10/14, 684-85.

Ms. Edwards also stated in the recorded statement:...then I called Shelly's phone and he answered. Oh, I was so mad. And I told him, "Get your ass over here and get this fuckin' shit out of my fucking yard now." So then he said, "Oh, quit it." And he hung up on me. RP 4/10/14, 686-87.

Ms. Edwards also stated in the recorded statement: So then David started walking back over to Shelly's. And I'm pissed by now. I'm like, "No, get this other shit out of my yard." So then he was all pissed off, and told me he didn't want to hear my dumb shit and this and that, and I said, "Well, then keep your fuckin' shit," I said, "Take it over to Shelly's. She likes being treated like shit. You know what? Take your shit and get out of here. I'm not associating with you," da, da, da.

RP 4/10/14, 476, 478. The state also indicated that Ms. Edwards never disavowed the accuracy of the prior statements, only that she did not recall them. RP 4/10/14, 478.

Pursuant to ER 803(a)(5), the court found Ms. Edwards unavailable due to her lack of memory and allowed admission of her interview with Deputy Wright. RP 4/10/14, 482-83, 484. The state advised the court that it could either offer the taped statement, or offer Ms. Edwards' statement through the testimony of Deputy Wright. RP 4/10/14, 483. The court indicated that in with *State v. Alvarado*, 89 Wash.App. 543, 949 P.2d 831 (1998), the taped statement was used. RP 4/10/14, 483. The court reviewed the taped statement outside the presence of the jury and found the internal content provided the necessary indicia of reliability, and that the recording process was reliable RP 4/10/14, 486-501; 503-506.

Deputy Wright testified about how the recorded statement from Ms. Edwards was obtained, and the audio recording was played, with redactions as ordered by the trial court. RP 4/10/14, 680-81, 682-697.

Amanda. VanSlyke testified that in late 2012 and early 2013 she lived at 232 Greenacres Road in Riverside, and that the property had a barn and a garage. RP 4/9/14, 446-448. Around December 2012, the defendant asked, and was given permission, to use the shop on the property. RP 4/9/14, 449-50. Afterwards Ms. VanSlyke became concerned that items being brought to the property by the defendant and co-defendants were not legal. RP 4/9/14, 452-453. Ms. VanSlyke identified a considerable amount of scrap material left on the property after law enforcement contacted her to search the property. RP 4/9/14, 455-56.

Sgt. Harrison spoke with the defendant on February 14, 2013, who knew he was being contacted about the ATVs before the officer asked; that he knew they came from the Methow Valley; and he then claimed Josh Taylor, Nicki Windsor, and Josh Howell were involved, but he was not. RP 4/10/14, 526-27. The defendant said that the ATVs had been at VanSlyke's property on Greenacres before they were moved to Shelly Priest's residence and that he wanted to be compensated for them being stored there. RP 4/10/14, 527-529, 530-34, 535. He also told Sgt. Harrison that the 28 foot trailer was chopped up in the barn at VanSlyke's property. RP 4/10/14, 527-529.

Frank Andre testified to locating a cellular phone at the Miller Road property in February 2013. 4/10/14, 551-554. Between the times Mr. Andre had found the property had been burglarized and when he found the cellular phone, he was contacted by Hannah Voelker, regarding information about who may have been involved in the burglary at the Miller Road property. RP 4/10/14, 555.

Det. Sloan testified to receiving the phone and trying to determine the ownership. RP 4/10/14, 563-69. The startup screen on the phone was of a woman's cleavage that was later determined to be Ms. Voelker. RP 4/10/14, 570. Detective Sloan initially saw photos of people who were unknown to the officer and photos of ATVs or snowmobiles. RP 4/10/14, 571-72. Detective Sloan wrote down a telephone number associated with the phone and contact telephone numbers for "home" and "Lynn". RP 4/10/14, 572. The detective then went back and searched through the sheriff's data system for those phone numbers. RP 4/10/14, 572-73. After obtaining a warrant for the phone, the detective testified about how the phone was processed, and about how the photos, messages, and contacts were documented. RP 4/10/14, 573-592.

A voice file on the phone dated December 13, 2012, was identified as the defendant requesting photos. This was followed within a few minutes by photos and messages related to the Meyers ATVs being sent to the defendant's phone. RP 4/10/14, 632-637, 666. The detective also testified about additional messages on the phone, and message exchanges between the defendant's phone and co-defendant Windsor around the time of the theft. RP 4/10/14, 639-643, 666-672. The messages on the phone included a draft message listing prices for the ATVs with the defendant's initials "D.P." RP 4/10/14, 642, 666-67.

The defendant was convicted of three counts of trafficking in stolen property first degree and two counts of possessing a stolen motor vehicle. RP 4/11/14, 843-844; CP 17.

At sentencing, the state requested, and the court imposed standard legal financial obligations of \$1,110.50, that included the mandatory victim assessment of \$500 and DNA fee of \$100. RP 5/22/14, 852, 856. The state also sought, and the court ordered, restitution in the amount of \$15,777.92. RP 5/22/14, 852-53, 855. The defendant did not object to any of the legal financial obligations, nor ask for any relief on the discretionary costs.

Moreover, the defendant agreed to the restitution total and signed the restitution order at the time of sentencing. RP 5/22/14, 853-54, 856; CP 16.

2. Procedural and substantive facts pertaining to the motion to suppress the information on the cellular phone.

On April 7, 2014, the court heard the defendant's motion to suppress evidence gathered from a cellular phone. In reaching its decision, the court reviewed the briefing of the parties, the police reports attached to the briefing of the parties, and the testimony of Frank Andre given at the motion hearing. See generally RP 4/17/14; CP 152-212, 140-151.

Frank Andre testified at the hearing that he resided full time at a caretaker's residence at 22 Miller Road, Omak. RP 4/7/14, 47-48. He is a caretaker for the elderly owners of the property, who reside in the main residence on the property part time during the non-winter months. RP 4/7/14, 48-49. When the owners are not residing on the property, Mr. Andre exercises the right to determine whom may come onto the property. RP 4/7/14, 49.

Mr. Andre was away from the residence for approximately two weeks, and upon his return in early January 2013, he discovered a burglary occurred at the Miller Road property. RP

4/7/14, 48; CP 148, 160. There was still snow on the ground and Mr. Andre was able to see foot and vehicle traffic. RP 4/7/14, 49. Mr. Andre reported the burglary to law enforcement on January 2, 2013. RP 4/7/14, 49; CP 148. The tracks were not fresh, as they had partially melted and been covered by a light layer of snow after having been made. CP 148-49.

On February 26, 2013, after the snow melted off, Mr. Andre located a cellular phone outside, near the lower barn and Mr. Andre's residence. RP 4/7/14, 49-50, 52; CP 160. A person would have had to drive through the property to access the barn area; and this area was not open to the public. RP 4/7/14, 50.

Mr. Andre took the cell phone he had found to Sheriff Frank Rogers, as Mr. Andre did not know who the phone belonged to, and did want to try and turn it on due to the phone's condition. RP 4/7/14, 50-51, 52, 53; CP 160. The phone was wet and the back cover was missing. RP 4/7/14, 50; CP 160. Sheriff Rogers provided the phone to Detective Sloan. CP 160. The phone's battery was removed from the phone and it was placed into a bag of rice to attempt to dry it out. CP 160.

No one, including defendant Priest, ever contacted Mr. Andre to inquire about the missing phone. RP 4/7/14, 51. Mr.

Priest did not have permission to be at the 22 Miller Road property.  
RP 4/7/14, 51.

On December 25, 2013, the detective was processing cell phones in an unrelated investigation and retrieved the phone that had been brought in by Mr. Andre. CP 160. The Subscriber Identity Module (SIM card) in the phone was inserted backwards and was extremely worn, as if it had been removed and reinserted often. CP 160. The detective attempted unsuccessfully to power up the phone by reinserting the phone's battery pack. CP 160. The phone was then connected to a universal forensic extraction device to charge the battery. The phone model was not recognized by the extraction device, and was used only to charge the phone's battery. CP 160. The detective then powered up the phone. The phone had no cellular service. CP 160. The detective determined the cellular number associated with the phone to be 509-322-8198. CP 160. The detective was able to view a contact labeled "home" with a number of 509-422-0270; and another contact for "Lynn" with a number of 509-322-6565. CP 160. The detective viewed some of the photographs on the phone to see if anyone connected to the phone could be identified. Within the photographs were some dark

photographs of what appeared to be ATV's or snowmobiles; one red and one yellow. CP 160.

The detective showed the photos to Sheriff Rogers, who indicated around the time Mr. Andre discovered the burglary, Deputy Wright had a burglary investigation involving the theft of a red ATV and a yellow ATV. CP 161. The detective shut off the phone and no additional information was viewed until a search warrant was obtained. CP 160-161. The detective used the three phone numbers he had found to check against the sheriff's office case system, where he found prior contacts associating the 509-322-8198 and 509-422-0270 numbers to David Priest; and a contact associating 509-322-6565 to Lynn Stanley. CP 161. However only Lynn Stanley was known to be an actual account holder on the number associated with her name. CP 161.

A search warrant was obtained by Deputy Wright on December 29, 2013, and the telephone was searched pursuant to the warrant. Located on the phone were digital photographs that included photos of Hanna Volcker; and multiple messages, photos, and a voice file sent to and from the phone to a number associated with co-defendant Nicki Windsor. CP 161-168; RP 4/7/14, 87-89. The messages between December 11 and 13, 1012 discussed

obtaining a trailer from the Twisp area, requests for photos of the stolen ATV's in order to determine prices, and details about the ATV's. CP 161-168.

### C. ARGUMENT

1. The defendant's assignments of error to the trial courts findings of fact (15, 17, and 20), are without any factual support and the findings are binding on appeal.

The defendant erroneously assigns error to three of the trial courts findings of fact from the suppression hearing. Brief of Appellant, 1. The findings are supported by substantial evidence.

Challenged findings of fact entered after a suppression hearing that are supported by substantial evidence are binding on appeal, and, where the findings are unchallenged, they are verities on appeal. *State v. O'Neill*, 148 Wn. 2d 564, 571, 62 P.3d 489, 494 (2003); *State v. Halstien*, 122 Wash.2d 109, 129, 857 P.2d 270 (1993).

Substantial evidence is "evidence sufficient to persuade a fair-minded, rational person of the truth of the finding." *State v. Mendez*, 137 Wash.2d 208, 214, 970 P.2d 722 (1999).

Conclusions of law pertaining to suppression of evidence are reviewed de novo. *Mendez*, 137 Wash.2d at 214.

The reviewing Appellate Court defers to the trier of fact on “issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. Thomas*, 150 Wash.2d 821, 874–75, 83 P.3d 970 (2004).

In this case the assignments of error are based on speculation of the defendant, and assertions of what the defendant in hind sight feels the officer should have done.<sup>3</sup>

The defendant sets out not factual basis supporting his assignments of error as to the trial courts findings of fact, and provided no legitimate challenge to the findings. The findings are binding on the appeal.

Similarly, the assignments of error regarding the trial court’s conclusions are without support and the issues raised are addressed in the following sections.

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<sup>3</sup> For example, at Brief of Appellant at 21, defendant claims the officer “...was able to immediately locate the cell phone’s number and thus had the means to identify the phone’s owner.” This specious claim ignores the facts that the SIM card appeared to not match the phone; that the phone may well have been stolen property; that to determine the owner necessitates obtaining individual subscriber information from the cellular provider, and that simply checking a phone number against contacts in the sheriff’s system is not determinative of ownership.

2. No search warrant was necessary to view the information on the cellular phone that was abandoned in a place in which the defendant had no right to be and where he had no legitimate expectation of privacy. Additionally even if a privacy right could be legitimately asserted, the exceptions of plain view, open view, and community caretaking would operate to permit the officer to view the information.

Defendant had no privacy right to the area in which the cellular phone was abandoned, nor to the abandoned cellular phone.

There is no privacy right in abandoned property, thus there is no invasion of that no-existent privacy right that would require a warrant.

Under article I, section 7 of our state constitution, warrantless searches are per se unreasonable unless they fall under a specific exception to the warrant requirement. *State v. Walker, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998)*.

In addition to the abandonment of the cellular phone, open view, plain, view and community caretaking exceptions would apply to the officer's view of information on the recovered and unclaimed cellular phone.

- a. **There is no privacy right in abandoned property and a search warrant is not required.**

One of the long standing exceptions to the warrant requirement is for voluntarily abandoned property. *State v. Evans*, 159 Wash.2d 402, 407, 150 P.3d 105 (2007); see also *State v. Reynolds*, 144 Wash.2d 282, 287, 27 P.3d 200 (2001) (law enforcement may retrieve and search voluntarily abandoned property without a warrant or probable cause). Needing neither a search warrant nor probable cause, a law enforcement officer may retrieve and search voluntarily abandoned property without implicating an individual's privacy rights under the Fourth Amendment or under article I, section 7 of our state constitution. *State v. Reynolds*, 144 Wn.2d at 287.

Although property will not be deemed voluntarily abandoned, and thus not subject to a warrantless search, if a person abandons it because of unlawful police conduct. *State v. Reynolds*, 144 Wn.2d at 288. However, that is not the circumstance in this case.

To establish that the abandonment of the searched property was involuntary, a defendant must show two elements: "(1) unlawful police conduct and (2) a causal nexus between the unlawful conduct and the abandonment." *State v. Reynolds*, 144 Wn.2d at 288. The defendant can claim neither in this case.

“Voluntary abandonment is an ultimate fact or conclusion based generally upon a combination of act and intent.” *Evans*, 159 Wash.2d at 408, (citing 1 Wayne R. LaFare, Search and Seizure § 2.6(b), at 574 (3d ed.1996)). “ ‘Intent may be inferred from words spoken, acts done, and other objective facts, and all the relevant circumstances at the time of the alleged abandonment should be considered.’ ” *Evans*, 159 Wash.2d at 408, 150 P.3d 105 (quoting *State v. Dugas*, 109 Wash.App. 592, 595, 36 P.3d 577 (2001)).

The fallacy of the defendant’s argument is that he tries to obscure the fact that relinquishment of privacy is conditioned on the *area* where the item was found, not the nature of the abandoned item itself. Defendant tries to obscure the standard for abandonment by trying to argue the mere technology potential of a phone is somehow determinative; when in fact it is irrelevant to the analysis. Whether the abandoned item is a purse, wallet, briefcase, file, planner, diary, or cell phone, is irrelevant to the analysis in this case.

The question is whether the defendant relinquished his reasonable expectation of privacy by discarding the property. *Evans*, 159 Wash.2d at 408, 150 P.3d 105. The defendant bears the burden of showing he had an actual, subjective expectation of

privacy and that his expectation was objectively reasonable. *Evans*, 159 Wash.2d at 409. A critical factor in determining whether abandonment has occurred is the status of *the area* where the searched item was located (emphasis added). *State v. Hamilton*, 179 Wash.App. 870, 885, 320 P.3d 142 (2014). “Generally, no abandonment will be found if the searched item is in an *area* where the defendant has a privacy interest.” *Id.*

The issue is not abandonment in the strict property right sense but, rather, “whether the defendant in leaving the property has relinquished her reasonable expectation of privacy so that the search and seizure is valid.” *State v. Dugas*, 109 Wash.App. 592, 595, 36 P.3d 577 (2001) (quoting *United States v. Hoey*, 983 F.2d 890, 892–93 (8th Cir.1993)); see also *United States v. Nordling*, 804 F.2d 1466 (9th Cir.1986).

Even in *State v. Hinton*, 319 P.3d 9, 15 (2014), cited by the defendant to claim a warrantless search, the Court recognized the lack of privacy rights in abandoned property: “A defendant who leaves a paper bag on a street corner—where it lies in plain view on premises belonging to a stranger—certainly waives his privacy interest by voluntarily exposing it to the public.” *State v. Hinton* 319

P.3d at 15, (citing *State v. Loran*, 62 Wash.2d 4, 380 P.2d 733 (1963)).

Similarly, the defendant's attempt to rely upon the *dissent* in *State v. Samalia*, 186 Wn. App. 224, 228-29, 344 P.3d 722, 725 (2015) does not support his argument and is completely different from the facts in his case. See *Samalia*, 186 Wn. App. at 230 (defendant driving stolen vehicle then fled from when a police officer approached and directed him to return to the vehicle; court found the defendant's hasty flight under the circumstances was sufficient evidence of an intent to abandon the vehicle, which was the search area and included the cellular phone).<sup>4</sup>

At the suppression hearing, the defendant was required to show a reasonable expectation of privacy in the abandoned cell phone and that he did not voluntarily abandon it. Clearly the defendant did not (and still cannot) show any expectation of privacy in the abandoned phone left outside on the private property of

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<sup>4</sup> The dissent in *Samalia* based its objection in large part on the fact that the officer had pulled out his service weapon and intended to detain the defendant, who then fled; finding it reasonable to assume that the defendant either forgot about his cell phone in the console of the stolen car or decided that if he hoped to escape, retrieving the phone was not an option. Although there was no unlawful police conduct, the dissent analogized it to involuntary abandonment. See *Samalia*, 186 Wn. App. at 238.

another, for nearly two months. The abandonment of the phone at the Miller Road property was unrelated to any law enforcement activity and was a “voluntary” abandonment.

There was no legitimate privacy right remaining in the abandoned cellular phone that could later be asserted by the defendant.

**b. Even if law enforcement had seized the phone the privacy statute does not apply where no interception occurs.**

Defendant cites to *State v. Roden*, 179 Wash.2d 893, 321 P.3d 1183 (2014) and *State v. Hinton*, 179 Wash.2d 862, 319 P.3d 9 (2014) to claim the officer’s access to the cell phone numbers and photos was a warrantless search akin to interception of private communications. Defendant’s reliance on these cases is misplaced.

*Roden* and *Hinton* arose from the same set of facts, where officers impersonated one defendant (Lee), and responded to texts from the other defendant (Hinton). The courts found the act was an “interception” under the privacy act (RCW 9.73.030(1)).

In analyzing whether the officer posing as Lee “intercepted” the communications, the court found that the text messages were opened, read, and responded too *before* they reached Lee

(emphasis added). *State v. Roden*, 179 Wash.2d at 904. The court found the actions to be interception under the ordinary definition of “intercept”—to “stop ... before arrival ... or interrupt the progress or course.” *Id.*

In the present case, there was no interception. The court *specifically* did not address the issue of text messages that have already been received by the intended recipient and remain in storage. *State v. Roden*, 179 Wash.2d at 904.

Additionally, in this case, unlike *Roden* and *Hinton*, there was no viewing of communications like texts or emails. The officer viewed phone numbers and some photos. These are not analogous to phone calls, emails, or mailed letters, but more analogous to pager information discussed in *Roden* and *Hinton* and found not to constitute private conversations.

Additionally, in *Hinton* the court noted: the observation of that which is in plain view does not constitute a search because voluntary exposure to the public extinguishes any privacy interest. *State v. Hinton*, 319 P.3d at 15-16. The court noted that the initial message observed by the officer before he began responding was arguably in the detective's *plain view* (emphasis added) *State v. Hinton*, 319 P.3d at 15-16.

**c. The numbers and photos on the abandoned phone were in plain view and no warrant was required.**

The "plain view" doctrine is an exception to the warrant requirement that applies after police have intruded into an area in which there is a reasonable expectation of privacy. *State v. O'Neill*, 148 Wn.2d 564, 583 (2003). The doctrine requires that the officer had a prior justification for the intrusion and immediately recognized what is found as incriminating evidence such as contraband, stolen property, or other item useful as evidence of a crime. *Id.* This differs from open view where the officer makes his or her observation from an area that is not constitutionally protected. The requirements for plain view are (1) a prior justification for intrusion, and (2) immediate knowledge by the officer that he had evidence before him. *State v. Chrisman*, 94 Wn.2d 711, 715, 619 P.2d 971 (1980); *Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301, 2306, 110 L. Ed. 2d 112 (1990).

Washington courts have modified immediacy requirement. In *State v. Palmer*, 5 Wash.App. 405, 487 P.2d 627 (1971), the court held the plain view doctrine applicable where the evidence seized was inside of a brown bag, and thus technically not 'immediately' known to be evidence. *State v. Palmer*, 5 Wash.App at 410—411. Similarly it was not unreasonable for an officer to look inside a

garbage bag, identical to one that contained evidence and which was observed lying in plain view in the same area. *State v. Campbell*, 13 Wn. App. 722, 729, 537 P.2d 1067, 1071-72 (1975).

Additional the “plain-view” doctrine is often discussed in reference to warrantless searches being presumptively unreasonable, but this characterization overlooks the important difference between searches and seizures. If an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy. *Horton*, 110 S. Ct. 2306, (citing *Arizona v. Hicks*, 480 U.S. 321, 325, 107 S.Ct. 1149, 1152, 94 L.Ed.2d 347 (1987); *Illinois v. Andreas*, 463 U.S. 765, 771, 103 S.Ct. 3319, 3324, 77 L.Ed.2d 1003 (1983)).

The seizure of an object in plain view does not involve an intrusion on privacy. If the interest in privacy has been invaded, the violation must have occurred *before* the object came into plain view and there is no need for an inadvertence limitation on seizures to condemn it (emphasis added). *Horton*, 110 S. Ct. at, 2310. The prohibition against general searches and general warrants serves primarily as a protection against *unjustified* intrusions on privacy (emphasis added). But reliance on privacy concerns that support

that prohibition is misplaced when the inquiry concerns the scope of an exception that merely authorizes an officer with a lawful right of access to an item to seize it without a warrant. *Id.* (abrogating the “inadvertent discovery” requirement for plain view set out in *State v. Bell*, 108 Wn. 2d 193, 196, 737 P.2d 254, 257 (1987) and other Washington cases).

Here the officer had justification to view the phone to determine ownership. The test for determining whether a defendant retains a reasonable expectation of privacy is essentially an objective one. *State v. Carey*, 42 Wn. App. 840, 854-56, 714 P.2d 708, 715-17 (1986). Even if the court could find there was some privacy right in the abandoned phone, the officer’s view of the phone was justified. The photos of ATV’s did provide knowledge that they may be evidence connected to a theft.

**d. The numbers and photos on the abandoned phone would have also been in open view.**

The “open view doctrine” is satisfied, where the object under observation is not subject to any reasonable expectation of privacy and the observation is not within the scope of the constitution. *E.g.* *State v. Rose* 128 Wn.2d 388, 392, 909 P.2d 280 (1996). As a general proposition, when a law enforcement officer is able to

detect something by utilization of one or more of his senses while lawfully present at that vantage point ... that detection does not constitute a search. *Id.* The conduct of an officer does not exceed the open view doctrine just because the officer is there deliberately to look for evidence of a crime. *Id.* at 393.

As stated above, there was no expectation of privacy in the abandoned cellular phone. The viewing of information on the phone did not constitute a search.<sup>5</sup>

- e. **The officer was entitled to view the phone information under the community caretaking exception in order to determine legitimate ownership of the phone.**

Additionally, another exception to the warrant requirement is the community caretaking function of police officers. The exception exists so officers can assist citizens and protect property. *State v. Swenson*, 59 Wn. App. 586, 588, 799 P.2d 1188 (1990); *State v. Hutchison*, 56 Wn. App. 863, 865-66, 785 P.2d 1154 (1990).

This principle was first articulated under in *State v. Sanders*, 8 Wn. App. 306, 310, 506 P.2d 892, review denied, 82 Wn.2d 1002 (1973), which stated that police officers may enter a dwelling without

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<sup>5</sup> Moreover, no facts indicate the abandoned phone that was received by law enforcement was locked, password protected, encrypted, or its access otherwise limited in any way.

a warrant to render emergency aid and assistance to a person whom they reasonably believe to be in distress and in need of that assistance. See also *State v. Nichols*, 20 Wn. App. 462, 465, 581 P.2d 1371 (police responding to a reported fight could enter a garage because they had reasonable grounds to believe their assistance was necessary for the protection of life), review denied, 91 Wn.2d 1004 (1978).

This exception allows for the limited invasion of constitutionally protected privacy rights when it is necessary for police officers to render aid or assistance or when making routine checks on health and safety. Such invasion is allowed only if (1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns; (2) a reasonable person in the same situation would similarly believe that there was need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place being searched. *State v. Thompson*, 151 Wn. 2d 793, 802, 92 P.3d 228, 232-33 (2004). Whether an encounter made for noncriminal non-investigatory purposes is reasonable depends on a balancing of the individual's interest in freedom from police interference against the public's interest in having the police perform a community caretaking

function. *Id.* (citing *Kalmas v. Wagner*, 133 Wash.2d 210, 216–17, 943 P.2d 1369 (1997))

The need to protect or preserve life, avoid serious injury, or protect property in danger of damage, justifies an entry that would otherwise be illegal absent an emergency. Police officers owe other duties to the public such as rendering aid to individuals in danger and protecting their property and premises. The doctrine does not require probable cause but must be motivated by the perceived need to render aid or assistance.

In the present case the phone was abandoned and inoperable. It required efforts by law enforcement to try and dry out the phone and then charge it to make it operable. The officer properly exercised his community caretaking function in preserving the phone and then attempting to identify the phone's legitimate owner. At the time the phone was turned in, it was unknown if the phone was linked to involvement in the Miller Road burglary that occurred over two months prior; or if the phone had been part of property that had been stolen from the Miller Road residence. There was no identified owner. Viewing the phone to determine ownership would fall within the officer's community caretaking function, just as if the item were a lost wallet, purse, or camera.

3. The prior tape recorded statement of Francis Edwards was properly admitted under ER 803(a)(5) and ER 613, where she lacked knowledge of the statement and where it was inconsistent with her testimony on cross exam denying contact with the defendant.

a. **The trial court did not abuse its discretion in admitting the statement under ER 803(a)(5)**

The admission of statements under ER 803(a)(5) is reviewed for an abuse of discretion. See *State v. Castellanos*, 132 Wash.2d 94, 97, 935 P.2d 1353 (1997); 5B Karl B. Tegland, Wash. Practice § 368 at 186 (3rd ed.1989); *State v. Strauss*, 119 Wash.2d 401, 416, 832 P.2d 78 (1992).

Admission is proper when the following factors are met: (1) the record pertains to a matter about which the witness once had knowledge; (2) the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony; (3) the record was made or adopted by the witness when the matter was fresh in the witness' memory; and (4) the record reflects the witness' prior knowledge accurately. *State v. Alvarado*, 89 Wn. App. 543, 548, 949 P.2d 831, 834-37 (1998) *State v. Mathes*, 47 Wash.App. 863, 867-68, 737 P.2d 700 (1987); ER 803(a)(5).

The content of the statement established Edwards had knowledge of the events when the recordings were made; at trial, she testified that he could not remember the events. The recording was Edwards' own words and thus were made and adopted by her while the matter was still fresh in her memory, and were made after she had sent a kite and a card to law enforcement indicating she had knowledge of the events. The recordings accurately reflected Edwards' prior knowledge.

ER 803(a)(5) prescribes no particular method of establishing accuracy, and the issue must be resolved on a case-by-case basis. The requirement that a recorded recollection accurately reflect the witness' knowledge may be satisfied without the witness' direct averment of accuracy at trial. *Alvarado*, 89 Wn. App. at 551. The rule applies regardless of the declarant's availability to testify, and thus does not contemplate that the declarant will always testify, let alone affirmatively vouch for the record's accuracy. *Alvarado*, 89 Wn. App. at 550. The court must examine the totality of the circumstances, including (1) whether the witness disavows accuracy; (2) whether the witness averred accuracy at the time of making the statement; (3) whether the recording process is reliable;

and (4) whether other indicia of reliability establish the trustworthiness of the statement. *Alvarado*, 89 Wn. App. at 551-52.

In this case, Edwards never recanted or disavowed accuracy of her statement; there was no suggestion that the tape did not accurately reflect her statements or her prior knowledge; and there was a substantial indicia of reliability based on both the internal content and the evidence presented by other witnesses. As in *Alvarado*, the statement reflected a detailed and comprehensive knowledge of the events surrounding the crimes. In the interview Edwards answered all questions lucidly and at no time suggested that she was unsure of the events she was describing. The contents of the statements were also corroborated by the physical evidence and testimony of the other witnesses.

Unlike the witness in *Alvarado*, Ms. Edwards did not deny knowledge of the crime. Even so, *Alvarado* found that even the witness' capability to lie does not render subsequent statements inadmissible. *Alvarado*, 89 Wn. App. 543, 552-53.

In the present case there was also information illuminating Ms. Edwards' reluctance to testify while she was being held in jail and her selective lack of memory at trial. She indicated that the defendant had previously stated to her in the jail "I smell a rat." RP

4/10/2014, 693. As in *Alvarez*, the court was entitled to consider these circumstances when evaluating whether the statements bore sufficient indicia of reliability.

There was not an abuse of discretion in admitting the statement under ER 803(a)(5). See also *State v. Derouin*, 116 Wn. App. 38, 64 P.3d 35, 39-40 (2003) (finding trial court abused its discretion by *not* admitting a statement written down by deputy, where court failed to properly apply *Alvarado's* totality of the circumstances test; finding there was sufficient indicia of its reliability; and that the issue is not whether the statement is admissible, but the weight to be accorded to the statement in the face of witness' current testimony); and *State v. White*, 152 Wn. App. 173, 178, 215 P.3d 251, 252-53 (2009) (prior recorded statement admitted where witness testified at trial she had no recollection of how assault occurred due to intoxication at the time, and could not remember if the statements were true.); and *State v. Nava*, 177 Wn. App. 272, 311 P.3d 83, 94 (2013) (Even where witness disavows the record of his or her prior knowledge, the trial court does not abuse its discretion in admitting prior recorded recollection where there is other reliable evidence that the record accurately reflects the witness's prior knowledge and articulable

reason why the trial court disbelieves the witness's current disavowal, where the trial).<sup>6</sup> The Appellate Court defers to the trial court; we do not weigh the credibility of witnesses. *Nava*, 177 Wn. App. at 297; *In re Welfare of Sego*, 82 Wash.2d 736, 739–40, 513 P.2d 831 (1973).

**b. The statement was also admissible under ER 613.**

In general, a witness's prior statement is admissible for impeachment purposes if it is inconsistent with the witness's trial testimony. See *State v. Lavaris*, 106 Wash.2d 340, 344, 721 P.2d 515 (1986); 5A *Karl B. Tegland, Washington Practice, Evidence* § 256, at 306 (3d ed.1989) (citing *Pilon v. Lindley*, 100 Wash. 340, 170 P. 1022 (1918) and *Sterling v. Radford*, 126 Wash. 372, 218 P. 205 (1923)).

In the present case, the witness did testify on cross examination that she did not discuss with the defendant the ATV's brought to her residence. This was inconsistent with her taped statement where she described multiple exchanges between her

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<sup>6</sup> The Court in *Nava* stated: Unlike us (the Appellate Court), the trial court was able to observe each witness's demeanor at trial and compare that to the witness's demeanor in the tape-recorded interviews. *Nava*, 177 Wn. App. at 297.

and the defendant regarding the ATVs at her residence. RP 4/9/14, 436, RP 4/10/14, 684-689. Additionally, the state had specifically asked Ms. Edwards about those exchanges on direct. RP 4/09/14, 426-30.

No foundation is needed to impeach a witness's testimony with a prior statement as evidence of bias. *State v. Spencer*, 111 Wn. App. 401, 409, 45 P.3d 209, 214 (2002). The policy of requiring a witness to have the chance to refute or agree with a prior inconsistent statement only applies to extrinsic evidence that is offered as inconsistent with the witness's testimony. A prior inconsistent statement is a comparison of something the witness said out of court with a statement the witness made on the stand. *Spencer*, 111 Wn. App. at 409-10. ER 613(b) requires the witness have the opportunity either to admit the inconsistency and explain it (in which case the testimony of the prior statement is not admissible as evidence) or to deny it (in which case evidence of the prior inconsistent statement is admissible). *See also, State v. Horton*, 116 Wn. App. 909, 916, 68 P.3d 1145, 1149 (2003)(it is sufficient for the examiner to give the declarant an opportunity to explain or deny the statement, either on cross-examination or after the introduction of extrinsic evidence).

In the present case, Edwards testimony on cross examination about contact with the defendant was inconsistent with her prior statement. The state did provide the opportunity to admit the inconsistency and explain it when it asked Edwards about the responses in her taped statement. The taped statement was admissible extrinsic evidence of her prior inconsistent statement.<sup>7</sup>

4. All References to and Arguments Based upon Documents Not Contained in the Appellate Court Record must Be Disregarded by this Court.

The composition of the record on appeal is limited by RAP 9.1(a) to a report of the trial court proceedings, the papers filed with the Superior Court Clerk, and any exhibits admitted in the trial court proceedings. *State v. Hughes*, 106 Wn.2d 176, 206, 720 P.2d 838 (1986). Matters referred to in a brief but not included in the record cannot be considered on appeal. *State Stevenson*, 16 Wn. App. 341, 345, 555 P.2d 1004 (1976), *review denied*, 88 Wn.2d 1008 (1977). When a party refers to matters in

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<sup>7</sup> Appellant also complained of the use of leading questions by the state and impeachment of a witness called by the state. These are well settled issues under ER 611 and ER 613 and within the sound discretion of the trial court. In addition to the courts broad discretion as to the mode of interrogation, Ms. Edwards was also hostile toward the state's cases, causing the state to ask the court to consider a finding of contempt based on Ms. Edwards' lack of response to questions asked by the state. Additionally, ER 613 applies to any witness, not just those called by an opposing party.

a brief that are not included in the record, the error should be brought to the appellate court's attention in a responsive pleading. *Engstrom v. Goodman*, 166 Wn. App. 905, 909 n. 2, 271 P.3d 959, review denied, 175 Wn.2d 1004 (2012) (" So long as there is an opportunity (as there was here) to include argument in the party's brief, the brief is the appropriate vehicle for pointing out allegedly extraneous materials—not a separate motion to strike.").

Appendices A-D to Priest's Brief are all documents from separate and distinct court matters. None of these documents appear in the trial court record of this case, nor are they contained in the Clerk's Papers. All of these documents must be disregarded by this Court in ruling upon the merits of this appeal. All argument based upon these documents that is contained in Priest's Brief must be disregarded by this Court in ruling upon the merits of this appeal.

Priest's attaching documents from other separate cases to his brief violates binding Washington Supreme Court precedent. See generally *Spokane Research v. City of Spokane*, 155 Wn.2d 89, 97-99, 117 P.3d 1117 (2005) (refusing to consider documents from a related proceedings where the

party that asked the appellate court to consider the documents did not address RAP 9.11); *In re the Adoption of B.T.*, 150 Wn.2d 409, 414-16, 78 P.3d 634 (2003) (an appellate court may not take judicial notice of the record of another independent and separate judicial proceeding; rule applies even when the separate proceedings involve the same parties); *Sears v. Grange Ins. Ass'n*, 111 Wn.2d 636, 762 P.2d 1141 (1988) (RAP 9.11 motion to admit insurance policy endorsement into appellate record denied because it was inequitable to excuse the insurance company's failure to offer the evidence earlier). RAP 9.1(a), which defines the "record on review," does not include such documents attached to appellate court motions or briefs.

5. Priest lacks standing to challenge RCW 43.43.7541

Priest asks this Court to find that RCW 43.43.7541 violates the constitutional guarantees of substantive due process and equal protection when applied to defendants who lack the present or likely future ability to pay the \$100 fee. Because Priest has not been found to be constitutionally indigent and has suffered no injury in fact, he lacks standing to challenge the statute.

A person cannot challenge the constitutionality of a statute unless he or she has been adversely affected by the provisions claimed to be unconstitutional. *State v. Lundquist*, 60 Wn.2d 397, 401, 374 P.2d 246 (1962). To establish standing, Priest must show (1) that he is within the zone of interests to be protected by the constitutional guarantee in question, and (2) that he has suffered an injury in fact, economic or otherwise. *Branson v. Port of Seattle*, 152 Wn.2d 862, 875-76, 101 P.3d 67 (2004). The injury must be “fairly traceable to the challenged conduct and likely to be redressed by the requested relief.” *State v. Johnson*, 179 Wn.2d 534, 552, 315 P.3d 1090 (2014) (quoting *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986)). The injury must be “(a) concrete and particularized, and (b) actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Witt v. Dep’t of Air Force*, 527 F.3d 805, 811 (9th Cir. 2008) (quoting *Luian v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). Where a party lacks standing to assert a claim, courts must refrain from reaching the merits of that claim, *Id.* at 552 (citing *Org. to Preserve Agric. Lands v. Adams County*, 128 Wn.2d 869, 896, 913 P.2d 793 (1996)).

Priest does not attempt to establish standing to challenge the statute in this case. Presumably, he would argue that the imposition of the mandatory fee without regard to his ability to pay unfairly subjects him to the possibility of future punishment if he is unable to pay due to indigence. Indeed, "the due process and equal protection clauses prevent a state from invidiously discriminating against, or arbitrarily punishing, indigent defendants for their failure to pay fines they cannot pay." *Johnson*, 179 Wn.2d at 552 (citing *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L Ed. 2d 221 (1983)).

In *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997), our supreme court clarified the imposition of fees against an indigent party as a part of sentencing is not constitutionally forbidden; rather, constitutional principles are implicated only if the State seeks to enforce collection of the fee "at a time when the defendant is unable, through no fault of his own, to comply." 131 Wn.2d at 241 (quoting *State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992) (internal quotation marks omitted)). Thus, it is at the point of enforced collection that a defendant may assert a constitutional

objection on the ground of indigency.<sup>8</sup> *Id.* Even at the point of collection, it is only if the defendant is “constitutionally indigent” that a constitutional violation occurs. *Johnson*, 179 Wn.2d at 553.

While there is no precise definition of constitutional indigence, “*Bearden* essentially mandates that we examine the totality of the defendant's financial circumstances to determine whether he or she is constitutionally indigent in the face of a particular fine.” *Johnson*, 179 Wn.2d at 553. A finding of statutory indigence does not establish constitutional indigence. *Id.* at 553, 555. Thus, in *Johnson*, our supreme court rejected a challenge to the driving while license suspended statute based on a claim of indigence because *Johnson*, while statutorily indigent, was not constitutionally indigent and therefore not in the class protected by the Due Process Clause. 179 Wn.2d at 555.

It is up to the party seeking review of an issue to provide an adequate record for review. *City of Spokane v. Neff*, 152 Wn.2d 85, 91, 93 P.3d 158 (2004). In his Brief, Priest does not even assert that he is “indigent”; moreover, the record contains no evidence

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<sup>8</sup> As argued in the following section of this brief, the fact that the State has not yet attempted to enforce collection makes Priest's claim unripe.

demonstrating *constitutional* indigence. The relevant “constitutional considerations protect only the constitutionally indigent,” Priest can demonstrate no injury in fact and therefore lacks standing.

*Johnson*, 179 Wn.2d at 555. This Court should decline to address the merits of his claims.

6. The Court should not reach the merits of the claim because it is not ripe for review.

Even if Priest has standing to bring this constitutional challenge, the issue is not ripe for review. Generally, “challenges to orders establishing legal financial sentencing conditions that do not limit a defendant's liberty are not ripe for review until the State attempts to curtail a defendant's liberty by enforcing them.” *State v. Lundy*, 176 Wn. App. 96, 108, 308 P.3d 755 (2013). It is only when the State attempts to collect or impose punishment against an indigent person for failure to pay that constitutional principles are implicated. *State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992).

Our supreme court adhered to this position in *Blank*, when it held that an inquiry into defendant's ability to pay is not constitutionally required before imposing a repayment obligation in a judgment and sentence, as long as the court must determine

whether the defendant is able to pay before sanctions are sought for nonpayment. *Blank*, 131 Wn.2d at 239-42. The point of enforced collection or sanctions for nonpayment is the appropriate time to discern the individual's ability to pay because before that point, "it is nearly impossible to predict ability to pay[.]" *Id.* at 242. "If at that time defendant is unable to pay through no fault of his own, *Bearden* and like cases indicate constitutional principles are implicated". *Id.* at 242.

Where nothing in the record reflects that the State has attempted to collect the DNA fee, any challenge to the order requiring payment on hardship grounds is not yet ripe for review. *Lundy*, 176 Wn. App. at 109. That is so in this case. Because the issue is unripe, this Court should decline to reach its merits.

7. The alleged errors are not manifest constitutional errors and should not be reviewed under RAP 2.5.

Priest did not object to the DNA collection or to imposition of the DNA fee in the trial court. Priest also did not object the imposition of non-mandatory costs and fees imposed by the court. Accordingly, RAP 2.5(a) bars consideration of his claims.

A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP

2.5(a)(3); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Not every constitutional error falls within this exception; the defendant must show that the error occurred and that it caused actual prejudice to the defendant's rights. *McFarland*, 127 Wn.2d at 333. If the facts necessary to adjudicate the issue are not in the record, the error is not manifest. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009).

Here, Priest's constitutional claims depend on his present and future inability to pay the mandatory DNA fee and non-mandatory costs. But as discussed above, there is no evidence in the record to show whether Priest is constitutionally indigent, so the error is not manifest within the meaning of RAP 2.5(a). Moreover, Priest approved the order of restitution in his case, which was substantially larger than the mandatory and non-mandatory fees imposed. There was no basis for the trial court to find the defendant lacked the present or future ability to pay.

Similarly, any claim that the trial court erred by requiring him to submit a DNA sample because he had given one before relies on the proposition that Priest had in fact submitted a sample in the past. See Brief of Appellant, pg. 52. But that is not evident in the record either, so that alleged error is also not manifest.

In *State v. Blazina*, our supreme court recognized that “[a] defendant who makes no objection to the imposition of discretionary [legal financial obligations (LFOs)] at sentencing is not automatically entitled to review.” 182 Wn.2d 827, 832, 344 P.3d 680 (2015). Thus, where defendants fail to object to the LFOs at sentencing, it is appropriate for appellate courts to decline review. *Id.* at 834.

Recently in *State v. Camacho*, the court declined to review the defendant’s LFO issue, and reiterated that in *Blazina*, the Washington Supreme Court agreed that the LFO issue is not one that can be presented for the first time on appeal because this aspect of sentencing is not one that demands uniformity, and the appellate courts retain discretion whether or not to consider the issue initially on appeal. *Camacho*, 2015 WL 3537224 at \*1 (citing *Blazina*, 182 Wn.2d at 830. To that end, the appellate courts retain discretion whether or not to consider the issue initially on appeal. *Id.*

Similarly in *State v. Lyle*, the court held that where the defendant did not challenge the trial court’s imposition of LFOs at his sentencing, he may not do so on appeal. *State v. Lyle*, 46101-3-II, 2015 WL 4156773, at \*2 (Wash. Ct. App. July 10, 2015); *Blazina*,

174 Wash.App. at 911. The *Lyle* court noted that their decision in *Blazina*, 174 Wash.App. at 911, 301 P.3d 492, was issued before the defendant's sentencing and provided notice that the failure to object to LFOs during sentencing waives a related claim of error on appeal. *Id.* Although an appellate court *may* use its discretion to reach unpreserved claims of error, the court in *Lyle* declined to exercise such discretion. *Lyle*, 2015 WL 4156773 at \*2; *Blazina*, 182 Wash.2d at 830.

Because Priest failed to raise the issue below, precluding development of an adequate record, this Court should decline review.

8. Priest fails to show that the DNA fee statute violates due process

Priest presents an as-applied constitutional challenge to RCW 43.43.7541. Even if this Court reaches the merits of the issue, Priest cannot meet his burden to prove that the DNA fee statute is unconstitutional.

A statute is presumed constitutional, and the party challenging the legislation bears the burden of proving the legislation is unconstitutional beyond a reasonable doubt. *State ex*

*rel. Peninsula Neighborhood Ass'n v. Dep't of Transp.*, 142 Wn.2d 328, 335, 12 P.3d 134 (2000). Constitutional challenges are questions of law subject to de novo review. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006).

The federal and Washington State Constitutions guarantee that an individual is not deprived of "life, liberty, or property, without due process of the law." U.S. Const, amends. V, XIV; Wash. Const, art. I, § 3. The state and federal due process clauses are coextensive; the state's provision offers no greater protection. *State v. McCormick*, 166 Wn.2d 689, 699, 213 P.3d 32 (2009). The Due Process Clause confers both procedural and substantive protections. *Amunrud*, 158 Wn.2d at 216. "Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." *Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 53, 309 P.3d 1221 (2013) (quoting *Amunrud*, 158 Wn.2d at 218-19).

The level of scrutiny applied to a due process challenge depends upon the nature of the interest involved. *Nielsen*, 177 Wn. App. at 53 (citing *Amunrud*, 158 Wn.2d at 219). Where no fundamental right is at issue, as in this case, the rational basis

standard applies. *Amunrud*, 158 Wn.2d at 222. Rational basis review merely requires that a challenged law be “rationally related to a legitimate state interest.” *Nielsen*, 177 Wn. App. at 53 (quoting *Amunrud*, 158 Wn.2d at 222). This deferential standard requires the reviewing court to “assume the existence of any necessary state of facts which [it] can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest.” *Nielsen*, 177 Wn. App. at 53 (quoting *Amunrud*, 158 Wn.2d at 222).

The legislature created the DNA database to store DNA samples of those convicted of felonies and certain misdemeanor offenses. RCW 43.43.753. The legislature identified such databases as “important tools in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts.” *Id.* To fund the DNA database, the legislature enacted RCW 43.43.7541, which originally required courts to impose a \$100 DNA collection fee with every sentence imposed for specified crimes “unless the court finds that imposing the fee would result in undue hardship on the offender.” Former RCW 43.43.7541 (2002). In 2008, the legislature amended the statute to make the fee mandatory regardless of

hardship: "Every sentence ... must include a fee of one hundred dollars." RCW 43.43.7541. Eighty percent of the fee goes into the "state DNA database account." *Id.* Expenditures from that account "may be used only for creation, operation, and maintenance of the DNA database[.]" RCW 43.43.7532.

Priest recognizes that requiring those convicted of felonies to pay the DNA collection fee serves a legitimate state interest in operating the DNA database. He argues, however, that imposing the fee upon those who cannot pay does not rationally serve that interest. This Court should reject that argument.

In *Curry*, our supreme court upheld the constitutionality of the mandatory victim penalty assessment (VPA) as applied to indigent defendants. 118 Wn.2d 911, 829 P.2d 166 (1992). Like the DNA fee, the VPA is mandatory and must be imposed regardless of the defendant's ability to pay. *Lundy*, 176 Wn. App. at 102. The appellants in *Curry* argued that the statute could operate to imprison them unconstitutionally if they were unable to pay the penalty. 118 Wn.2d at 917. It is fundamentally unfair to imprison indigent defendants solely because of their inability to pay court-ordered fines. *Bearden*, 461 U.S. at 667-68. The *Curry* court agreed with this Court that the sentencing scheme includes

sufficient safeguards to prevent unconstitutional imprisonment of indigent defendants:

Under RCW 9.94A.200,<sup>9</sup> a sentencing court shall require a defendant the opportunity to show cause why he or she should not be incarcerated for a violation of his or her sentence, and the court is empowered to treat a nonwillful violation more leniently. Moreover, contempt proceedings for violations of a sentence are defined as those which are *intentional*, RCW 7.21.010(1)(b). Thus, 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 (citing *State v. Curry*, 62 Wn. App. 676, 682, 814 P.2d 1252 (1991)) (emphasis in original).

While *Curry* addressed the mandatory VPA, the same principle has been extended to all mandatory legal financial obligations, including the DNA collection fee required by RCW 43.43.7541. See *Lundy*, 176 Wn. App. at 102-03; *State v. Kuster*, 175 Wn. App. 420, 424-26, 306 P.3d 1022 (2013). Although RCW 9.94A.200 has been recodified, the same safeguards against imprisonment of indigent defendants discussed in *Curry* remain in effect today. See RCW 9.94B.040; RCW 7.21.010(1)(b). Additionally, any defendant who is not in “contumacious default” may seek relief “at any time ... for remission of the payment of costs

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<sup>9</sup> Recodified in 2001 as RCW 9.94A.634 and in 2008 as RCW 9.94B.040.

or any unpaid portion thereof on the basis of hardship. RCW 10.01.160(4). A defendant may also seek reduction or waiver of interest on LFOs upon a showing that the interest “creates a hardship for the offender or his or her immediate family.” RCW 10.82.090(2)(a), (c).

As in *Curry*, these safeguards are sufficient to prevent sanctions and imprisonment for mere inability to pay. Accordingly, like the VPA, the mandatory DNA fee in RCW 43.43.7541 does not violate substantive due process as applied to indigent defendants.

Priest cites *Blazina* to support his due process claim. *Blazina* held that a different statute, RCW 10.01.160(3), requires the trial court to conduct an individualized inquiry into the defendant's ability to pay before imposing discretionary LFOs. 182 Wn.2d 837-38.

Priest's reliance on *Blazina* is misplaced. First, *Blazina* involved a claimed violation of a statute, not due process, and its holding is based on statutory construction. Second, *Blazina* concerned *discretionary* LFOs, not mandatory fees like the one involved here. 182 Wn.2d 837-38. Nothing in *Blazina* changes the principle articulated in *Curry* that mandatory LFOs may be constitutionally imposed at sentencing without a determination of the defendant's ability to pay so long as there are sufficient

safeguards to prevent imprisonment of indigent defendants for a noncontumacious failure to pay.

Priest fails to show that the mandatory DNA fee required by RCW 43.43.7541 violates substantive due process as applied to indigent defendants. If this Court reaches the merits of this issue, it should affirm.

9. The DNA fee statute does not violate equal protection.

Priest next contends that RCW 43.43.7541 violates equal protection when applied to defendants who have already provided a sample and paid the \$100 DNA collection fee. Because there is a rational basis to impose the fee every time an offender is sentenced for a new offense, Priest's claim fails.

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. *Harmon v. McNutt*, 91 Wn.2d 126, 130, 587 P.2d 537 (1978). The first question in evaluating an equal protection claim is whether the person claiming the violation is similarly situated with

other persons. *State v. Osman*, 157 Wn.2d 474, 484, 139 P.3d 334 (2006). “A defendant must establish that he received disparate treatment because of membership in a class of similarly situated individuals and that the disparate treatment was the result of intentional or purposeful discrimination.” *Id.*

There are two tests for analyzing an equal protection claim and “whenever legislation does not infringe upon fundamental rights or create a suspect classification,” the rational relationship test is used. *State v. Smith*, 93 Wn.2d 329, 336, 610 P.2d 869 (1980). Equal protection challenges to the DNA statute do not implicate fundamental rights or create a suspect classification and are thus subject to a rational basis standard of review. *State v. Olivas*, 122 Wn.2d 73, 94-95, 856 P.2d 1076 (1993). Under that test, “a law is subjected to minimal scrutiny and will be upheld unless it rests on grounds wholly irrelevant to the achievement of a legitimate state objective.” *State v. Schaaf*, 109 Wn.2d 1, 17, 743 P.2d 240 (1987) (internal quotation omitted).

The party challenging the statute has the burden to show that a legislative classification is purely arbitrary. *State v. Coria*, 120 Wn.2d 156, 172, 839 P.2d 890 (1992). The rational basis test requires only that the means employed by the statute be rationally

related to a legitimate State goal, not that the means be the best way of achieving that goal. *Id.* at 173. “[T]he Legislature has broad discretion to determine what the public interest demands and what measures are necessary to secure and protect that interest.” *State v. Ward*, 123 Wn.2d 448, 516, 869 P.2d 1062 (1994).

Priest's equal protection claim is that of the relevant group of “all defendants subject to the mandatory DNA fee,” the law invidiously discriminates against those who have been convicted and sentenced multiple times by forcing them to pay the DNA fee more than once. The argument fails in its basic premise because Priest has not established that, as a repeat offender, he is “similarly situated” to those who have been convicted and sentenced only once. See *Osman*, 157 Wn.2d at 484. In countless ways, from increased punishment for higher offender scores, to first time offender sentencing alternatives; the law rationally distinguishes between first-time offenders and those with more elaborate criminal histories. Because Priest fails to show that he is “similarly situated” to first-time offenders, this Court should reject his equal protection claim.

Even assuming Priest is similarly situated to all others subject to the DNA testing statute, his claim fails because there is a

rational basis for imposing the fee every time a person is convicted and sentenced.

The original purpose of the statute is to investigate and prosecute sex offenses and violent offenses. Laws of 1989, ch. 350, § 1. In 2002, the legislature expanded on its purpose:

DNA databases are important tools in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts. It is the policy of this state to assist federal, state, and local criminal justice and law enforcement agencies in both the identification and detection of individuals in criminal investigations and the identification and location of missing and unidentified persons. Therefore, it is in the best interest of the state to establish a DNA data base and DNA data bank containing DNA samples submitted by persons convicted of felony offenses ....

RCW 43.43.753 (codified as amended Laws of 2002, ch. 289, § 1).

The statute imposes a \$100 fee for “every sentence” imposed under the act, but does not require an additional DNA sample from an individual if the Washington State Patrol Crime Laboratory already has a sample. RCW 43.43.7541; RCW 43.43.754(2).

Priest argues that if an offender has already submitted a sample pursuant to an earlier qualifying conviction, the fee is unnecessary and imposing it in subsequent sentences does not rationally relate to the legitimate purpose of the law. The argument

presumes that the fee's only purpose is related to the *collection* of the sample. But the legislative findings demonstrate that the purpose of the statute is much broader. RCW 43.43.753. A defendant's previously-submitted DNA sample could and would be used in subsequent cases for the purposes of investigation, prosecution, and detection of recidivist acts. *Id.* Thus, the fee imposed after "every sentence" does not merely fund the collection of the samples, but also contributes to the expense of maintaining the database so that the original sample may be retained and used in the investigation and prosecution of any future offenses the defendant chooses to commit. Those who commit no subsequent offenses need not pay more than once.

The legislature's 2008 amendments further demonstrate that the purpose of the DNA fee extends beyond collection. The act originally provided that the fee was "for collection of a biological sample as required under RCW 43.43.754." Laws of 2002, ch. 289, § 4. In 2008, the legislature removed the language that the fee was for the collection of a biological sample, stating simply that "[e]very sentence imposed under [this act] must include a fee of one hundred dollars." Laws of 2008, ch. 97, § 3. This change suggests that the legislature recognized that the fee was not solely for the

purpose of obtaining the sample, but for expenses involved in the sample's use in later investigations and prosecutions.

The imposition of the \$100 fee after "every sentence" is rationally related to the purpose of not only obtaining the original sample, but also for maintaining the database for use in future criminal investigations, prosecutions and detection of recidivist acts. Priest fails to show that RCW 43.43.7541 violates equal protection. This Court should affirm.

#### **D. CONCLUSION**

For all the foregoing reasons, the State respectfully asks this Court to affirm Priest's convictions and his sentence.

Dated this 11 day of Sept 2015

Respectfully Submitted by:

  
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