

FILED  
SEPT 11, 2015  
Court of Appeals  
Division III  
State of Washington

No. 32834-1-III

IN THE COURT OF THE APPEALS  
OF THE STATE OF WASHINGTON

DIVISION III

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THE STATE OF WASHINGTON, Respondent

v.

JAMES C. JOHNSON, Appellant.

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**BRIEF OF RESPONDENT  
&  
RESPONSE TO PERSONAL RESTRAINT PETITION**  
No. 32846-5-III

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**TABLE OF CONTENTS**

	Page
<b>TABLE OF AUTHORITIES</b> .....	iv
<b>I. ISSUES</b> .....	1
<b>I. APPEAL -</b>	
1. <u>Whether the trial court erred in imposing legal financial obligations?</u> .....	1
2. <u>Whether the \$100 DNA collection fee is constitutional?</u> .....	1
3. <u>Whether the \$100 DNA collection fee is mandatory for subsequent felony convictions?</u> .....	1
4. <u>Whether the collection of a DNA sample is mandatory for subsequent felony convictions?</u> .....	1
<b>II. PERSONAL RESTRAINT PETITION –</b>	
1. <u>Whether the defendant was denied effective assistance of counsel regarding the decision to seek appeal?</u> .....	1
2. <u>Whether there was sufficient evidence to justify conviction?</u> .....	1
3. <u>Whether the defendant was denied effective assistance of counsel in determining defense strategy?</u> .....	1
<b>II. STATEMENT OF THE CASE</b> .....	2
<b>III. ARGUMENT</b> .....	3
<b>I. APPEAL</b> .....	3
1. <u>Defendant’s challenge to imposition of legal financial obligations is not ripe for challenge.</u> .....	3

2.	<u>The \$100 DNA collection fee is legal.</u> .....	6
3.	<u>The \$100 DNA collection fee is mandatory for all felony convictions.</u> .....	10
4.	<u>The collection of a DNA sample is mandatory for a defendant's subsequent felony convictions</u> .....	12
II.	PERSONAL RESTRAINT PETITION .....	15
5.	<u>Defendant was not denied effective assistance of counsel.</u> .....	17
6.	<u>Sufficient evidence exists to uphold the jury verdict.</u> .....	17
7.	<u>Defendant was not denied effective assistance of counsel.</u> .....	22
IV.	CONCLUSION .....	26

## TABLE OF AUTHORITIES

### State Supreme Court

<u>State v. Blazina</u> , ___ Wn.2d. ___, (filed Mar. 12, 2015) .....	5
<u>State v. Ward</u> , 123 Wn.2d 488, 869 P.2d 1062 (1994).....	7
<u>Amunrud v. Bd. of Appeals</u> , 158 Wn. 2d 208, 143 P.3d 571 (2006).....	8
<u>DeYoung v. Providence Med. Ctr.</u> , 136 Wn.2d 136, 960 P.2d 919 (1998).....	8
<u>State v. Armendariz</u> , 160 Wn.2d 106, 156 P.3d 201 (2007).....	10
<u>State ex rel. Billington v. Sinclair</u> , 28 Wn.2d 575, 183 P.2d 813 (1947).....	10
<u>Stone v. Chelan Cy. Sheriff's Dep't</u> , 110 Wn.2d 806, 756 P.2d 736 (1988).....	11
<u>State v. Hughes</u> , 154 Wn.2d 118, 110 P.3d 192 (2005).....	12
<u>State ex rel. Carroll v. Junker</u> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	13
<u>State v. Keller</u> , 143 Wn.2d 267, 19 P.3d 1030 (2001).....	14
<u>In re Pers. Restraint of Coats</u> , 173 Wn.2d 123, 267 P.3d 324 (2011).....	15
<u>In re Pers. Restraint of Hagler</u> , 97 Wn.2d 818, 650 P.2d 1103 (1982).....	15
<u>In re Pers. Restraint of Davis</u> , 152 Wn.2d 647, 101 P.3d 1 (2004).....	16
<u>In re Pers. Restraint of Cook</u> , 114 Wn.2d 802, 792 P.2d 506 (1990).....	16

<u>In re Pers. Restraint of Williams</u> , 111 Wn.2d 353, 759 P.2d 436 (1988).....	16
<u>In re Pers. Restraint of Lord</u> , 152 Wn.2d 182, 94 P.3d 952 (2004).....	16
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980) .....	17
<u>In re Pers. Restraint of Cross</u> , 180 Wn.2d 664, 327 P.3d 660 (2014).....	18
<u>State v. Grier</u> , 171 Wn.2d 17, 246 P.3d 1260 (2011).....	23
<u>In re Pers. Restraint of Crace</u> , 174 Wn.2d 835, 280 P.3d 1102 (2012).....	24
<u>In re Pers. Restraint of Rice</u> , 118 Wn.2d 876, 828 P.2d 1086 (1992).....	26

State Court of Appeals

<u>State v. Baldwin</u> , 63 Wn.App. 303, 818 P.2d 1116 (Div. I, 1991) .....	4, 5, 6
<u>State v. Curry</u> , 62 Wn.App. 676, 814 P.2d 1252 (Div. I, 1991) .....	4
<u>State v. Lundy</u> , 176 Wn. App. 96, 308 P.3d 755 (Div. II, 2013) .....	5
<u>State v. Kuster</u> , 175 Wn.App. 420, 306 P.3d 1022 (Div. III, 2013) .....	5, 10, 11
<u>State v. Smits</u> , 152 Wn.App. 514, 216 P.3d 1097 (Div. I, 2009) .....	6
<u>State v. Brewster</u> , 152 Wn.App. 856, 218 P.3d 249 (Div. I, 2009) .....	7

<u>Jones v. King County</u> , 74 Wn.App. 467, 874 P.2d 853 (Div. I, 1994) .....	7
<u>State v. Thornton</u> , ___ Wn.App. ___, (Div. III, filed June 16, 2015) .....	10, 11
<u>Council House, Inc. v. Hawk</u> , 136 Wn.App. 153, 147 P.3d 1305 (Div. I, 2006) .....	13
<u>State v. Rundquist</u> , 79 Wn.App. 786, 905 P.2d 922 (Div. II, 1995) .....	13
<u>Bulzomi v. Dep't of Labor &amp; Indus.</u> , 72 Wn.App. 522, 864 P.2d 996 (Div. I, 1994) .....	14
<u>State v. Brune</u> , 45 Wn.App. 354, 725 P.2d 454 (Div. I, 1986) .....	16
<u>State v. Walton</u> , 64 Wn.App. 410, 824 P.2d 533 (Div. III, 1992). .....	18
<u>State v. Garcia</u> , 57 Wn.App. 927, 791 P.2d 244 (Div. I, 1990) .....	23

State Statutes/Session Laws

RCW 9.94A.760 .....	3
RCW 10.01.160 .....	4, 5, 6
RCW 7.68.035 .....	4
RCW 43.43.7541 .....	4, 6, 7, 9, 10, 11, 12
RCW 36.18.020 .....	4
RCW 9.94A.550 .....	5
LAWS OF 2002, ch. 289, § 1 .....	7
LAWS OF 2008, ch. 97, § 1 .....	7

RCW 43.43.754.....	8, 10, 12, 13, 14
RCW 43.43.753.....	8

United States Supreme Court

<u>F.C.C. v. Beach Commc'ns, Inc.</u> , 508 U.S. 307, 113 S.Ct. 2096 (1993).....	8
<u>Washington v. Recuenco</u> , 548 U.S. 212, 126 S.Ct. 2546 (2006).....	12
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 2781 (1979).....	18
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052 (1984); .....	23, 24, 25
<u>Hill v. Lockhart</u> , 474 U.S. 52, 106 S.Ct. 366 (1985).....	25

United States District Court

<u>James v. Borg</u> , 24 F.3d 20 (9th Cir. 1994).....	25
<u>Hendricks v. Calderon</u> , 70 F.3d 1032 (9th Cir. 1995).....	25
<u>Hatch v. Oklahoma</u> , 58 F.3d 1447 (10th Cir. 1995).....	25
<u>Hill v. Lockhart</u> , 474 U.S. 52 106 S.Ct. 366 (1985).....	25
<u>U.S. v. Olson</u> , 925 F.2d 1170 (9th Cir. 1991).....	25
<u>U.S. v. Vincent</u> , 758 F.2d 379 (9th Cir. 1985).....	25
<u>U.S. v. Ferreira-Alameda</u> , 804 F.2d 543,	

amended 815 F.2d 1251 (9th Cir. 1986) ..... 25

Wildman v. Johnson, 261 F.3d 832  
(9th Cir. 2001) ..... 26

Guam v. Santos, 741 F.2d 1167  
(9th Cir. 1984) ..... 26

Court Rules

RAP 2.5 ..... 5, 13

## I. ISSUES

### APPEAL

- a. Did the Trial Court Err By Imposing Legal Financial Obligations?
- b. Is the mandatory DNA collection fee unconstitutional?
- c. Must a Defendant pay successive \$100 DNA collection fees for subsequent felony convictions?
- d. Must a Defendant submit to DNA collection for subsequent felony convictions?

### PERSONAL RESTRAINT PETITION

- a. Was the defendant denied effective assistance of counsel and/or a direct appeal?
- b. Was the jury verdict based on sufficient evidence?
- c. Was the defendant denied effective assistance of counsel in determining defense strategy?

## II. STATEMENT OF THE CASE

Between March 2013 and July 2013, the Defendant, James Johnson, lived with his girlfriend and her daughter in Pomeroy, Washington. RP 24-25. During this time, the Defendant was very controlling and physical with each RP 25- 69-74, 77-79, 81, 89, 158, 162. On one particular occasion, the Defendant became angry with his girlfriend as he believed she was looking out the window at another man. RP 26. During this incident the girlfriend was texting her mother asking for help to leave. RP 27. The Defendant became angry and ordered his girlfriend to the bedroom. RP 27. While there, he grabbed his girlfriend by the throat and pulled her hair, demanding she unlock the phone. RP 27. While the Defendant grabbed his girlfriend's throat, he was exerting pressure, causing her breathing to be obstructed to the point she thought she might blackout. RP 28-29. When the girlfriend refused to unlock her phone, the Defendant grabbed a glass plate and demanded she unlock the phone or he would break the plate over her head. RP 27. The Defendant then grabbed a brick which was used to prop open the bedroom door, and said he would smash the brick into her face in hopes of leaving a scar. RP 27. The girlfriend was scared that the Defendant would actually follow through with his threats. RP 27.

At the conclusion of a two day jury trial, James Johnson was convicted of Assault in the Second Degree (DV) for the assault on his girlfriend. CP 33.

As part of the Defendant's sentence, the Court imposed discretionary costs of \$4,340.88 and mandatory costs of \$800, for a total Legal Financial Obligation (LFO) of \$5,140.88. CP 40. The defendant did not object to the court's imposition of any of the legal financial obligations. RP 228-244.

This appeal followed. CP 46-48.

### III. ARGUMENT

#### APPEAL -

- A. Defendant's challenge to imposition of legal financial obligations is not ripe for challenge.

For the first time on appeal, the Defendant contends that the trial court erred in finding that he had the ability to pay legal financial obligations without conducting any inquiry into his financial circumstances.

Whenever a person is convicted in superior court, the court may order the payment of legal financial obligations as part of the sentence. RCW 9.94A.760(1). Courts may impose costs as part of the legal financial obligations if a defendant has or will have the ability to

pay. RCW 10.01.160(3). Before making such a finding, the trial court must “[take] into account the financial resources of the defendant and the nature of the burden” imposed by the LFOs. *State v. Baldwin*, 63 Wn.App. 303, 312, 818 P.2d 1116 (Div. I, 1991). This court reviews a trial court’s determination of an offender’s financial resources and ability to pay for clear error. *Id.*

Three of the LFOs at issue in the Defendant’s sentence are mandatory. The \$500 victim assessment is required by RCW 7.68.035, irrespective of ability to pay. *State v. Curry*, 62 Wn.App. 676, 681, 814 P.2d 1252 (Div. I, 1991), *aff’d*, 118 Wn.2d 911, 829 P.2d 166 (1992). The \$100 DNA (deoxyribonucleic acid) collection fee is required by RCW 43.43.7541. And the \$200 criminal filing fee is required by RCW 36.18.020(2)(h). Because these LFOs are mandatory, they do not require the trial court to consider the Defendant’s ability to pay.

The legislature divested courts of the discretion to consider a defendant’s ability to pay mandatory legal financial obligations including restitution, victim assessments, DNA fees, and criminal filing fees by expressly directing that a defendant’s ability to pay should not be taken into account, and, thus, the trial court did not have jurisdiction to consider defendant’s current or likely future ability to pay restitution, victim assessment, DNA collection fee, or the criminal filing

fee. *State v. Lundy*, 176 Wn. App. 96, 308 P.3d 755 (Div. II, 2013).

Discretionary LFO's imposed in this case included: a \$750 appointed counsel recoupment fee; \$100 Domestic Violence Assessment; Witness Costs of \$2,297.88; Sheriff Service fees of \$193; and a \$1,000 fine. The "cost" as referenced by RCW 10.01.160 and *Baldwin, supra*, include each of these listed assessments except the fine.

The fine of \$1,000 is authorized by RCW 9.94A.550, which states within all sentences under RCW 9.94A, the court may impose a fine of up to \$50,000 for a class A felony, \$20,000 for a class B felony and \$10,000 for a Class C felony. There is no requirement that the court make any specific findings of ability to pay, prior to imposing a fine.

Our Supreme Court has recently decided that each appellate court must make its own decision to accept discretionary review on unchallenged LFOs. *State v. Blazina*, \_\_\_ Wn.2d. \_\_\_, (filed Mar. 12, 2015).

The State argues this Court should follow its previous decisions and decline to allow the Defendant to challenge for the first time on appeal, the finding regarding his ability to pay, *See: State v. Kuster*, 175 Wn.App. 420, 425, 306 P.3d 1022 (Div. III, 2013). *See also* RAP 2.5(a). The issue presented is not ripe for review. The Defendant may

petition the court at any time for remission or modification of the payments on the basis of manifest hardship. RCW 10.01.160(4); *Baldwin*, 63 Wn.App. at 310–11, 818 P.2d 1116. The initial imposition of court costs at sentencing is predicated on the determination that the defendant either has or will have the ability to pay. RCW 10.01.160(3). Because this determination is somewhat “speculative,” the time to examine a defendant’s ability to pay is when the government seeks to collect the obligation. *State v. Smits*, 152 Wn.App. 514, 523–24, 216 P.3d 1097 (Div. I, 2009). The Defendant may challenge the trial court’s imposition of “costs” when the government seeks to collect them.

For these reasons, the Court should not consider the challenge to imposition of costs for the first time on appeal.

B. The \$100 DNA collection fee is constitutional.

The Defendant argues the mandatory \$100 DNA collection fee, pursuant to RCW 43.43.7541, is unconstitutional in that it violates substantive due process.

In challenging this mandatory fee, the Defendant concedes that a fundamental right is not at issue and therefore the rational basis test would apply to the subject statute. Additionally, the Defendant

concedes that the collection of DNA samples of known criminal offenders and the funding of such a program is a legitimate state interest. The issue then before this court is whether imposition of a DNA collection fee is rationally related to the State's purpose.

Although the Defendant has conceded a legitimate State interest, this court should first look to the legislature's purpose in adopting the law. *State v. Brewster*, 152 Wn.App. 856, 218 P.3d 249 (Div. I, 2009) *citing State v. Ward*, 123 Wn. 2d 488, 499, 869 P.2d 1062 (1994). The DNA collection fee serves to fund the collection of samples and the maintenance and operation of DNA databases. *Brewster citing* RCW 43.43.7541. The legislature has repeatedly found that DNA databases are important tools in criminal investigations, in the exclusion of individuals who are the subject of investigation or prosecution, and in detecting recidivist acts. *Brewster citing* LAWS OF 2002, ch. 289, § 1; LAWS OF 2008, ch. 97, § 1. The databases also facilitate the identification of missing persons and unidentified human remains. *Id.*

The question now is whether the imposition of a mandatory \$100 collection fee is rationally related to the legitimate state interest(s) in the DNA collection program.

In applying the substantive due process test, this court should give deference to legislative policy decisions. *Jones v. King County*,

74 Wn.App. 467, 479, 874 P.2d 853 (Div. I, 1994) In doing so, this court “assume[s] the existence of any necessary state of facts which the court can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest.” *Amunrud v. Bd. of Appeals*, 158 Wn. 2d 208, 222, 143 P.3d 571 (2006). The regulation may only be struck down if there is no rational connection between the challenged statute and a legitimate government objective. *Id.* (emphasis mine). Indeed, the deferential rational basis standard may be satisfied even where the “legislative choice ... [is] based on rational speculation unsupported by evidence or empirical data.” *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 148, 960 P.2d 919 (1998) (alterations in original) (quoting *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)).

RCW 43.43.754 requires a DNA sample be taken from all persons convicted in this state of a felony (and other defined crimes). As stated in RCW 43.43.753 the purpose is to create a DNA database which will aid in criminal investigations, including the identification of suspects, the exclusion of individuals who are the subject of investigations, and in detecting recidivist acts. The collection of a \$100 fee from all persons convicted of a felony offense is logically connected to this program as these individuals will be required to

submit to a biological sample (DNA) collection. Costs are incurred and funding is necessary for the: process of collecting the sample; transferring it to the designated lab for testing and processing; input of the information into the State's database; as well as maintenance of said database. RCW 43.43.7541 requires eighty percent of the fee collected go to the DNA database account and twenty percent of the fee goes to the agency responsible for collection of the biological sample from the offender. It is reasonable to require those convicted of felony criminal offenses to have to carry some of the burden in paying for the tools used to investigate, track, and solve criminal offenses.

It is clear that the imposition of the \$100 DNA collection fee is rationally related to the cost of creating and operating the Washington State Offender DNA database.

Lastly, this court has held that monetary assessments that are mandatory may be imposed on indigent offenders at the time of sentencing without raising constitutional concerns because “[c]onstitutional principles will be implicated ... only if the government seeks to enforce collection of the assessments at a time when [the defendant is] unable, through no fault of his own, to comply,” and “[i]t is at the point of enforced collection ..., where an indigent may be faced with the alternatives of payment or imprisonment, that he may

assert a constitutional objection on the ground of his indigency.”

*Kuster*, 175 Wn.App. at 424.

C. The \$100 DNA collection fee is mandatory for all felony convictions.

RCW 43.43.7541 states: every sentence imposed for a crime specified in RCW 43.43.754 (which includes all felonies) must include a fee of one hundred dollars. However, the Defendant argues that this \$100 fee should not be imposed on those defendants who have previously paid the \$100 DNA collection fee pursuant to a previous conviction.

This court just recently determined that the imposition of the \$100 DNA collection fee upon a defendant for a subsequent felony conviction is mandatory. *State v. Thornton*, \_\_\_ Wn.App. \_\_\_, (Div. III, June 16, 2015). The court ruled that if the plain language of a statute is unambiguous, this court’s inquiry is at an end and the court will enforce the statute “in accordance with its plain meaning.” *Thornton* citing *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

“Such is the case here. The language in RCW 43.43.7541 that ‘[e]very sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars’ plainly and unambiguously provides that the \$100 DNA database fee is mandatory for all such sentences. See *State ex rel. Billington v. Sinclair*, 28 Wn.2d 575, 581, 183 P.2d 813 (1947) (word “must” is generally regarded as making a

provision mandatory); see also *State v. Kuster*, 175 Wash.App. 420, 424, 306 P.3d 1022 (2013) (DNA collection fee is mandated by RCW 43.43.7541).” *Thornton* at \_\_\_\_.

The Defendant however argues that this mandatory fee, imposed on all persons convicted of a felony offense, violates the equal protection clauses of the state and federal constitutions.

The State fails to recognize how a *mandatory* obligation imposed on *all* persons convicted of a felony, can be unequally applied. A statute violates the equal protection clause if it is administered in a manner that unjustly discriminates between similarly situated persons.” *Stone v. Chelan Cy. Sheriff's Dep't*, 110 Wn.2d 806, 811, 756 P.2d 736 (1988). In defining his own class, the Defendant claims that he is part of a class of defendants who have multiple felony convictions. This is not a classification created by the subject statute. The statute at issue defines the class as all persons convicted of a felony stating “every sentence imposed ... *must* include a fee of one hundred dollars...”, so no sub-class of felony convicts is created. RCW 43.43.7541. The statute is neutral on its face, treating all those sentenced in a similar fashion.

This mandatory fee does not impose unjust results. The only reason the Defendant is subject to the additional DNA cost, is because of his own subsequent criminal acts. It does not offend justice that a person who continues to commit criminal acts has to

continue to pay for law enforcement's investigative tools.

However, even if this fee was applied differently...to anybody, the law is rationally related to and not wholly irrelevant to achieving a legitimate state objective of: creating a DNA database used in criminal investigations for the identification of suspects, the exclusion of innocent individuals, and in detecting recidivist acts; the process of collecting the DNA samples, transferring them to the lab(s) for testing/processing and input of the data into the State's database; not to mention the regular maintenance of said database. See RCW 43.43.754 and 43.43.7541.

A statute is presumed to be constitutional, and the party challenging it bears the burden to prove beyond a reasonable doubt that it is unconstitutional. *State v. Hughes*, 154 Wn.2d 118, 132, 110 P.3d 192 (2005), *overruled on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). The Defendant has failed to meet such a burden.

D. The collection of a DNA sample is mandatory pursuant to all felony convictions.

The Defendant next argues that the trial court abused its discretion by ordering the Defendant to submit to the collection of a DNA sample. Discretion is abused when it is exercised on untenable

grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Discretion exercised in violation of a statute is untenable and amounts to an abuse of discretion. *Council House, Inc. v. Hawk*, 136 Wn.App. 153, 159, 147 P.3d 1305 (2006); *State v. Rundquist*, 79 Wn.App. 786, 793, 905 P.2d 922 (1995), *review denied*, 129 Wn.2d 1003 (1996).

Here, the trial court did not abuse its discretion by imposing the condition. RCW 43.43.754(1)(a) states that a biological sample must be collected for purposes of DNA identification analysis from every adult or juvenile individual convicted of a felony. Since this condition is required by statute, there is a tenable basis for imposing it. In addition, there was no request by the Defendant to waive the condition. A trial court cannot abuse discretion it was never asked to exercise.

The Defendant may not even be allowed to present this challenge initially on appeal. The normal rule is that an issue that was not presented to the trial court will not be considered by an appellate court. RAP 2.5(a). The appellate court of course has discretionary authority to consider an issue of manifest error affecting a constitutional right pursuant to RAP 2.5(a)(3), however, the Defendant has not attempted to argue that a constitutional right was violated by imposing this required condition.

RCW 43.43.754(2) states if the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required to be submitted. While the Defendant cites his criminal history for the basis that he should have previously had a DNA swab collected and submitted to the WSP crime lab, he has not provided this court with sufficient facts to support this new argument on appeal that a sample was in fact previously collected and submitted to the Washington State Patrol Crime Laboratory under a prior cause number. See *Thorton referencing Bulzomi v. Dep't of Labor & Indus.*, 72 Wn.App. 522, 525, 864 P.2d 996 (1994) (party seeking review has burden of perfecting record so reviewing court has all relevant evidence before it; insufficient record on appeal precludes review of the alleged errors).

Lastly, “[s]tatutory interpretation is a question of law, which this court reviews de novo. Courts should assume the Legislature means exactly what it says. Plain words do not require construction. The courts do not engage in statutory interpretation of a statute that is not ambiguous. If a statute is plain and unambiguous, its meaning must be derived from the wording of the statute itself. A statute is ambiguous if it can reasonably be interpreted in two or more ways, but it is not ambiguous simply because different interpretations are conceivable. The courts are not “obliged to discern any ambiguity by imagining a variety of alternative interpretations.”” *State v. Keller*, 143 Wn.2d 267, 276–77, 19 P.3d 1030 (2001) (internal citations omitted).

RCW 43.43.754(1) and 43.43.754(2) should be read together to

require the collection of a DNA sample from each defendant convicted of the listed offenses, however the submission of the DNA sample is not required if the WSP DNA database already includes the offender's DNA.

## **PERSONAL RESTRAINT PETITION –**

### Basis for Restraint -

The Defendant, James C. Johnson, is lawfully restrained pursuant to Garfield County Superior Court Cause No. 13-1-00010-9. See Judgment & Sentence CP 35-45.

### Argument -

Relief by way of a personal restraint petition is extraordinary. *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 132, 267 P.3d 324 (2011). A personal restraint petition is not a substitute for an appeal. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982). Collateral relief is limited because it “undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders.” *Id.*

An appellate court will reach the merits of a personal

restraint petition only after the petitioner makes a threshold showing of (1) constitutional error from which he has suffered actual and substantial prejudice, or (2) non-constitutional error constituting a fundamental defect that inherently resulted in a complete miscarriage of justice. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 671-72, 101 P.3d 1 (2004) (quoting *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990)). A petitioner's compliance with this "threshold burden" is mandatory, and the appellate court will refuse to address the merits of the petition in the absence of such compliance. *Cook*, 114 Wn.2d at 814 (citing *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988)).

The petitioner bears the burden of showing prejudicial error by a preponderance of the evidence. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004) (citing *Cook*, 114 Wn.2d at 813-14)). Bare assertions unsupported by references to the record, citation to authority, or persuasive reasoning cannot sustain the petitioner's burden of proof. *State v. Brune*, 45 Wn.App. 354, 363, 725 P.2d 454 (1986). "Where the record does not provide any facts or evidence on which to decide the issue and the petition instead relies on conclusory allegations, a court should decline to determine the validity of a personal restraint petition." *Cook*, 114 Wn.2d at 814 (citing *Williams*, 111 Wn.2d at 365).

A. The Defendant was Not Precluded from Seeking an Appeal.

The Defendant argues that he was denied effective assistance of counsel by reason that his trial counsel did not believe in the merits of a direct appeal. This particular claim is moot, as the Defendant has appealed the sentence of the Superior Court and was assigned counsel to assist him. See Court of Appeals, Div. III, case file #328341, generally.

As no additional relief can be granted by the court with regards to this claim, it should be deemed moot. In addition, because the Defendant is currently pursuing his appeal, he can show no prejudice.

B. Sufficient Evidence Exists to Justify the Jury's Verdict

The Defendant claims his conviction for assault in the second degree is based on insufficient evidence.

The standard for determining whether a conviction rests on insufficient evidence is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)

(emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979)). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Walton*, 64 Wn.App. 410, 415, 824 P.2d 533 (1992). *Abrogated on other grounds by In re Cross*, 180 Wn.2d 664, 327 P.3d 660 (2014). This standard is a deferential one, and questions of credibility, persuasiveness, and conflicting testimony must be left to the jury. *Walton* at 415–16, 824 P.2d 533.

The defendant was convicted of Assault in the Second Degree. In order to convict the Defendant, the jury had to find that: on or between April 1, 2013 and June 29, 2013 the defendant assaulted Catherine Johnson with a deadly weapon and/or by strangulation; and that the act occurred in Garfield County, Washington. CP 21 and RCW 9A.36.021.

Sufficient evidence existed as to each of these elements. The evidence included testimony from the victim Catherine Johnson, her daughter, an investigating deputy, a recorded interview of the defendant, as well as the defendant's own testimony.

Catherine Johnson testified that she lived with the Defendant, James Johnson, in Pomeroy, Washington from the end of March 2013 until the first weekend of July 2013. CP 25. Catherine testified

that the assault against her occurred in early June, 2013. CP 28. Catherine admitted to being arrested June 21<sup>st</sup>, 2013, at which time she was jailed. CP 32. The Defendant agreed that he lived with the victim and her daughter in Pomeroy from March 2013 for approximately three months, and that this was the only time he lived with the victim. CP 155-156. The Defendant testified that during the first couple of weeks the relationship was good, but soon started to deteriorate to the point that they were having major problems. RP 157-158. The victim's daughter also testified to the relevant time frame and location of events. RP 7-8. The investigating Deputy testified that the subject residence was located in Pomeroy, Garfield County, Washington; and that he had interviewed all the witnesses in late June 2013 shortly after the alleged incidents. RP 47-50. Based on the testimony of all the witnesses, there was sufficient evidence to prove that the events occurred between April 1, 2013 and June 29, 2013, in Garfield County, Washington.

The State next proved that it was the Defendant, James Johnson, who was alleged to have committed the illegal acts by way of in-court identifications. Catherine Johnson and the investigating Deputy each identified James Johnson as the Defendant. RP 31, 48.

Sufficient evidence of an assault was also introduced at trial.

In order to prove an assault in the second degree the State had to prove:

an intentional touching or striking of another person, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury. CP 24;

And, the assault occurred with a deadly weapon and/or by strangulation. CP 21.

The primary evidence was the testimony of the victim Catherine Johnson. The victim testified that on one particular occasion in early June, the Defendant became angry with her because he believed she was looking out the window at another man. RP 26. During this incident the girlfriend was texting her mother asking for help to leave. RP 27. The Defendant became angry, slapped her and ordered her to the bedroom. RP 27. While there, he grabbed her by the throat with one hand and pulled her hair with the other, demanding she unlock her phone. RP 27. While the Defendant was grabbing the victim's throat, he was exerting pressure, causing

her breathing to be obstructed to the point she thought she might blackout. RP 28-29. When the victim refused to unlock her phone, the Defendant grabbed a glass plate and demanded she unlock the phone or he would break the plate over her head. RP 27. The Defendant then grabbed a brick which was used to prop open the bedroom door, and said he would smash the brick into her face in hopes of leaving a scar. RP 27. The victim described the brick as a typical building brick, approximately 6-7 inches long and weighing 4-5 pounds. RP 29. The girlfriend was scared that the Defendant would actually follow through with his threats, ie – had apprehension and fear of bodily injury. RP 27.

The Defendant's interview and testimony were used to corroborate the victim's testimony. The Defendant admitted to being physical with his girlfriend to the point of being assaultive. RP 106-111. He also admitted to the scenario in which he was mad at his girlfriend for looking out the window at a man. RP 108-110. The Defendant admitted there was a fight at that time. RP 108-110. The Defendant acknowledged holding the victim down, but thought it was by her jacket and not her throat. RP 116. The Defendant also admitted that a brick was used to hold the bedroom door open, substantiating the weapon's presence. RP 117. Lastly, the Defendant admitted that he had a scar on his own face from a brick which would

arguably confirm his knowledge of the brick's ability to leave a lasting scar. RP 117.

The victim's daughter also confirmed that the Defendant was controlling and assaultive of the victim generally and that he hit and choked her. RP 12, 15.

After viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The Defendant admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Questions of credibility, persuasiveness, and conflicting testimony must be left to the jury. Based on these rules of review, the trial testimony was sufficient evidence to prove that at the relevant time and place, the Defendant offensively touched the victim, that he had compressed her neck obstructing her ability to breathe, and also created imminent fear of bodily injury to her face and head by the use of a 6-7 inch/4-5 pound brick.

The claim of insufficient evidence must fail.

C. The Defendant was not Denied Effective Assistance of Counsel.

Lastly, the Defendant claims he was denied effective

assistance of counsel because trial counsel “did not use the evidence he was supposed to use” as part of his defense.

A criminal defendant has a constitutional right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 682, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel’s conduct “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* at 686.

The petitioner has the burden of establishing ineffective assistance of counsel. *Strickland*, 466 U.S. 687. To prevail on a claim of ineffective assistance, the petitioner must show that (1) his attorney’s conduct fell below a professional standard of reasonableness (the performance prong), and that, (2) but for counsel’s unprofessional errors, there is a reasonable probability the outcome of the trial would have been different (the prejudice prong). *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). If either prong is not met, the court need not address the other prong. *State v. Garcia*, 57 Wn.App. 927, 932, 791 P.2d 244 (1990).

Counsel’s performance is strongly presumed to have been reasonable, and conduct that can be characterized as legitimate trial strategy is not deficient. *Grier*, 171 Wn.2d at 33. Courts should

recognize that, in any given case, effective assistance of counsel could be provided in countless ways, with many different tactics and strategic choices. *Strickland*, 466 U.S. at 689. The United States Supreme Court has warned that, “It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act of counsel was unreasonable.” *Strickland*, 466 U.S. at 689. Therefore, every effort should be met to “eliminate the distorting effects of hindsight,” and judge counsel’s performance from counsel’s perspective at the time. *Id.*

A personal restraint petitioner who shows both the requisite professional error and prejudice meets the “actual and substantial prejudice” standard necessary for collateral relief. *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012). However, prejudice is not established by showing that an error by counsel had some conceivable effect on the outcome of the proceeding. *Strickland*, 466 U.S. at 693. If the standard were that low, virtually any act or omission would meet the test. *Id.* The Defendant must establish a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *Id.* at 694.

A reviewing court need not address whether counsel's performance was deficient if it can first say that the defendant was not prejudiced. *Strickland*, at 697. No evidentiary hearing is required in a collateral proceeding if the defendant fails to allege facts establishing the kind of prejudice necessary to satisfy the *Strickland* test. *Hill v. Lockhart*, 474 U.S. 52, 60, 106 S.Ct. 366, 371, 88 L.Ed.2d 203 (1985)

In the current Personal Restrain Petition, the Defendant has failed to provide any specific facts outside of the record, or point to any specific instances within the record, to support his bald allegation that he was prejudiced.

An allegation of a defective defense will be deficient for failure to identify any evidence which counsel should have presented which would have supported a different defense. *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994). See also *Hendricks v. Calderon*, 70 F.3d 1032, 1042 (9th Cir. 1995); *Hatch v. Oklahoma*, 58 F.3d 1447, 1457 (10th Cir. 1995). The argument merely that the jury may have reached a different result if the case had been tried differently, will lose. *U.S. v. Olson*, 925 F.2d 1170, 1174 (9th Cir. 1991). The mere criticism of a tactic or strategy is an insufficient claim standing alone. *U.S. v. Vincent*, 758 F.2d 379, 382 (9th Cir. 1985); *U.S. v. Ferreira-Alameda*, 804 F.2d 543, amended 815 F.2d 1251, 1254 (9th Cir. 1986). A tactical decision with which the client disagrees cannot form the basis

for an ineffectiveness claim. *Wildman v. Johnson*, 261 F.3d 832, 839 (9th Cir. 2001); *Guam v. Santos*, 741 F.2d 1167, 1169 (9th Cir. 1984).)

Again, in the current Personal Restrain Petition, the Defendant has failed to provide any specific facts outside the record, or point to any specific instances within the record, to support his bald allegation that trial counsel acted below a professional standard. The petitioner must state with particularity facts which, if proven, would entitle him to relief. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 828 P.2d 1086 (1992).

Because: trial counsel's performance is presumed reasonable; tactical decisions are not a basis for a claim on ineffective assistance; and the Defendant has failed to present any evidence of error or prejudice; the claim of ineffective assistance of counsel must fail.

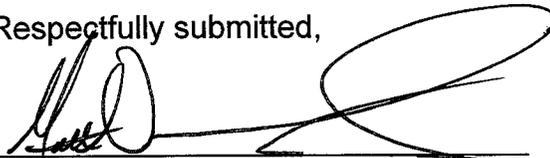
## **V. CONCLUSION**

In conclusion, the Defendant's conviction should be affirmed. The trial court did not err in imposing legal financial obligations, and if it had, the challenge is not yet ripe for challenge. The \$100 DNA collection fee is constitutional and mandatory for all felony

convictions. The collection of the Defendant's DNA sample is also constitutional and mandatory. Lastly, the Defendant's PRP fails as he has not met the necessary burden of proof to prove that he was denied effective assistance of counsel or that there was insufficient evidence to support the jury's verdict.

Dated this 11 day of September, 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Matt L. Newberg', written over a horizontal line.

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**COURT OF APPEALS,  
DIVISION III  
STATE OF WASHINGTON**

THE STATE OF WASHINGTON,  
Respondent,  
  
v.  
  
JAMES C. JOHNSON,  
Appellant.

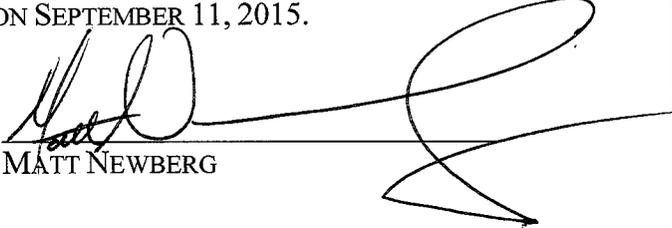
NO. 32834-1-III

**DECLARATION OF  
SERVICE**

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT ON SEPTEMBER 11, 2015, I SERVED A COPY OF THE BRIEF OF RESPONDENT IN THIS MATTER, TO:

ATTORNEY DAVID N. GASCH, VIA EMAIL AT GASCHLAW@MSN.COM ; AND  
JAMES JOHNSON, #318024, CBC, 180 EAGLE CREST WAY, CLALLAM BAY, WA 98326

SIGNED AT POMEROY, WASHINGTON ON SEPTEMBER 11, 2015.

  
MATT NEWBERG