

**FILED**

JUL 10 2015

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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

NO. 32926-7-III

STATE OF WASHINGTON,  
Respondent,

vs.

DENNIS W. RIOJAS,  
Appellant.

---

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR ADAMS COUNTY  
CAUSE NO. 13-1-00042-3

---

**BRIEF OF RESPONDENT**



FELICITY A. M. CHAMBERLAIN, WSBA #46155  
Deputy Prosecuting Attorney

Adams County Prosecutor's Office  
210 West Broadway  
Ritzville, WA 99169  
509-659-3219

Attorney for Respondent

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
RESPONSE TO ASSIGNMENT OF ERROR .....	1
STATEMENT OF THE CASE .....	1
ARGUMENT .....	1
CONCLUSION .....	7

## TABLE OF AUTHORITIES

### CASES

1.	<u>Amunrud v. Bd. of Appeals</u> , 158 Wn.2d 208, 216, 218-19, 222, 143 P.2d 571 (2006).	3
2.	<u>Bulzomi v. Dep't of Labor &amp; Indus.</u> , 72 Wn. App. 522, 525, 864 P.2d 996 (1994)	6
3.	<u>In Re Marriage of Johnson</u> , 96 Wn.2d 255, 258, 634 P.2d 877 (1981).	3
4.	<u>Nielsen v. Washington State Department of Licensing</u> , 177 Wn. App. 45, 53, 309 P.2d 1221 (2013)	3
5.	<u>Roberson v. Perez</u> , 156 Wn.2d 33, 39, 123 P.2d 844 (2005)	2
6.	<u>State v. Blazina</u> , 182 Wn.2d. 827, 832, 835, 344 P.3d 680 (2015)	1, 2
7.	<u>State v. Handley</u> , 115 Wn.2d 275, 289, 796 P.2d 1266 (1990)	5
8.	<u>State v. Osman</u> , 157 Wn.2d 474, 484, 486, 139 P.3d 334 (2006)	5
9.	<u>State v. Russell</u> , 171 Wn.2d 118, 249 P.3d 604 (2011)	2
10.	<u>State v. Thornton</u> , ___ Wn. App. ___, ___ P.3d ___ (No. 32478-8-III filed June 16, 2015)	4, 6

### OTHER AUTHORITIES

1.	RAP 2.5(a)	1
2.	RCW 43.43.7541	1, 2, 4, 6, 7

3.	Russell W. Galloway, Jr., <u>Basic Substantive Due Process Analysis</u> , 26 U.S.F. L.Rev. 625, 625-26 (1992)	3
4.	U.S. CONST. Amend. V	3
5.	U.S. CONST. Amend. XIV	5
6.	U.S. CONST. Amend. XIV § 1	3
7.	WASH. CONST. art. I, § 3	3
8.	WASH. CONST. art. I, § 12	5

## I. RESPONSE TO ASSIGNMENTS OF ERROR

1. Appellant did not preserve his claimed LFO errors for appellate review.
2. The DNA Collection Fee in RCW 43.43.7541 is constitutional and was appropriately imposed in this case.

## II. STATEMENT OF THE CASE

Appellant Dennis Riojas pleaded guilty to assault in the first degree on October 20, 2014. RP 7. The court sentenced him to 138 months in prison on October 27, 2014. RP 34. During the sentencing hearing the court did not make an oral finding on the record of the defendant's ability to pay. RP 33-35. The court made the standard boilerplate finding of ability to pay in paragraph 2.5 of the Judgement and Sentencing. CP 83. In addition to the discretionary LFOs, Mr. Riojas was ordered to pay mandatory fees of \$500.00 for victim assessment, \$100.00 for the DNA collection fee, and restitution. CP 83.

## III. ARGUMENT

### A. The Appellant did not preserve his claimed LFO errors for appellate review.

In Washington State, RAP 2.5(a) grants appellate courts discretion in accepting review of issues raised for the first time on appeal. State v. Blazina, 182 Wn.2d. 827, 832, 344 P.3d 680

(Citing State v. Russell, 171 Wn.2d 118, 249 P.3d 604 (2011)). Appellate courts normally decline to review issues raised for the first time on appeal. Id. 182 Wn.2d. at 834. (citing Roberson v. Perez, 156 Wn.2d 33, 39, 123 P.2d 844 (2005)).

In Blazina, the Washington State Supreme Court accepted review of a case involving the imposition of discretionary legal financial obligations when the issue was first raised on appeal. Id. 182 Wn.2d. at 835. However, the Court stressed that they were exercising their discretion and it is still up to the appellate court to makes its decision whether or not to accept discretionary review. Id. Given the Court's decision in Blazina, if this court in its discretion accepts review of this issue, the State will concede error in the imposition of discretionary legal financial obligations because the trial court did not examine Mr. Dennis Riojas' ability to pay on the record.

**B. RCW 43.43.7541 complies with the due process clause of the Constitution.**

The Appellant claims that RCW 43.43.7541 is unconstitutional because it violates his right to substantive due process. Under both the Washington and United States Constitutions the government cannot deprive a person of life,

liberty, or property without due process of law. U.S. CONST. amends. V, XIV, § 1; WASH. CONST. art. I, § 3. “The due process clause of the Fourteenth Amendment confers both procedural and substantive protections.” Amunrud v. Bd. of Appeals, 158 Wash.2d 208, 216, 143 P.3d 571 (2006). “Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.” Id., 158 Wash.2d at 218–19. It requires that “deprivations of life, liberty, or property be substantively reasonable”; in other words, such deprivations are constitutionally infirm if not “supported by some legitimate justification.” Nielsen v. Washington State Department of Licensing, 177 Wn. App. 45, 53, 309 P.2d 1221 (2013) (citing Russell W. Galloway, Jr., Basic Substantive Due Process Analysis, 26 U.S.F. L.Rev. 625, 625–26 (1992)). “Statutes are presumed constitutional, and the burden to show unconstitutionality is on the challenger.” Amunrud, 158 Wn.2d at 216, 143 P.2d 571 (2006) (citing In Re Marriage of Johnson, 96 Wn.2d 255, 258, 634 P.2d 877 (1981)).

The appellant correctly concedes that a fundamental right is not at issue, so the correct standard of review is the rational basis standard of review. Appellant’s Brief p. 16. Under this test, the

appellant must show the challenged law is not rationally related to a legitimate state interest. Amrund, 158 Wn.2d at 222. In his brief, Mr. Riojas incorrectly claims that it is the State's burden to show this statute is rationally related to a legitimate state interest. Appellant's Brief, p. 16.

The DNA collection fee furthers a legitimate state interest because it furthers the purpose of funding for the state DNA database and agencies that collect samples. State v. Thornton, \_\_\_ Wn.App. \_\_\_, \_\_\_ (No. 32478-8-III Filed June 16, 2015). The \$100 mandatory DNA collection fee that RCW 43.43.7541 imposes is used to cover the costs of both the agency that collects the sample, and the state DNA database. Even if the defendant was not required to provide a sample in this instance, the state still has an interest in maintaining the database, which includes Mr. Riojas. RCW 43.43.7541 is rationally related to a legitimate state interest and therefore does not violate Mr. Riojas' substantive due process right.

C. **The Mandatory \$100 DNA Collection Fee complies with the equal protection clause of the Constitution.**

The Appellant argues that the \$100 DNA Collection Fee also violates Mr. Riojas' constitutional right to equal protection. Equal

protection is guaranteed by the state and federal constitutions. U.S. Const. amend. XIV; Wash. Const. art. I § 12. The first step in analyzing an equal protection claim is determining 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) (citing State v. Handley, 115 Wn.2d 275, 289, 796 P.2d 1266 (1990)). The claimant bears the burden to establish he received disparate treatment because of membership in a class of similarly situated people and furthermore, that this disparate treatment was the result of intentional or purposeful discrimination. Id. 157 Wn.2d at 484. In cases where the state action does not threaten an important right or the claimant is not a member of a suspect or "semisuspect" class, the standard of review is the rational basis test. Id. "Under the rational basis test, state action does not violate the equal protection clause if there is a rational relationship between the classification and a legitimate state interest." Id. at 486. The court must uphold state action unless it rests on grounds entirely unrelated to a legitimate state interest. Id.

Appellant's argument that he is discriminated against because he has to pay the DNA collection fee multiple times when other defendants only have to pay once does not amount to an

equal protection violation. Every defendant that is convicted of a crime included in RCW 43.43.7541 is required to pay the DNA collection fee. Some people are defendants on multiple occasions and therefore are subject to the fine more than once. This is not because they are being singled out by a discriminatory law, but rather because they repeatedly commit crimes. Hence, Mr. Riojas has not demonstrated that he is a member of a class that has received disparate treatment. Furthermore, as stated above, RCW 43.43.7541 is rationally related to a legitimate state interest, namely the funding of DNA collection and the state DNA database.

Finally, Mr. Riojas has not established that he was required to pay the DNA collection fee multiple times, so even if the court agrees with his equal protection argument, it does not apply to him. A "party seeking review has the burden of perfecting the record so the reviewing court has all the relevant evidence before it." Thornton, No. 32478-8-III, at \_\_\_ (2015) (quoting Bulzomi v. Dep't of Labor & Indus., 72 Wn. App. 522, 525, 864 P.2d 996 (1994)).

D. **The State can find no evidence in the record that shows that the trial court ordered Mr. Riojas to submit another collection of his DNA.**

Appellant claims that the court ordered him to submit another collection of his DNA. He cites CP 25 with this claim. The

State can find no evidence in the record that the court ordered the defendant to submit another collection of his DNA. The section of the Judgement and Sentence, which requires the defendant to provide a DNA sample states, "This paragraph does not apply if it is established that the Washington State Patrol crime laboratory already has a sample from the defendant for a qualifying offense. RCW 43.43.7541." CP 83. The Judgement and Sentence contradicts the appellant's claim that the court ordered a sample of his DNA because providing a sample is contingent on the crime laboratory already having one or not.

#### **IV. CONCLUSION**

Because the defendant did not preserve this issue for appeal, State respectfully requests that this Court deny review and affirm the Discretionary Legal Financial Obligations imposed by the trial court. In addition, the appellant has presented no evidence or viable grounds for vacating the DNA collection fee. This court should affirm the \$100 DNA collection fee.

DATED this 9 day of JULY, 2015.

RANDY J. FLYCKT  
Adams County Prosecuting Attorney

By:   
\_\_\_\_\_  
FELICITY A. M. CHAMBERLAIN, WSBA #46155  
Deputy Prosecuting Attorney