

**FILED**  
**Dec 10, 2015**  
Court of Appeals  
Division III  
State of Washington

No. 33210-1-III

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

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

JUAN CARLOS ARANDA-SARABIA,  
Defendant/Appellant.

APPEAL FROM THE FRANKLIN COUNTY SUPERIOR COURT  
Honorable Bruce A. Spanner, Judge

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in admitting hearsay statements by the victim's roommate, Angelica Gomez Vibanco.

2. Mr. Aranda<sup>1</sup> was denied effective assistance of counsel by his counsel's failure to object to the admission of hearsay statements that violated his constitutional right of confrontation.

3. Mr. Aranda was denied a fair trial.

4. The trial court erred in ordering Mr. Aranda to pay a \$100 DNA-collection fee.

*Issues Pertaining to Assignments of Error*

1. Did the admission of hearsay statements by the victim's roommate, Angelica Gomez Vibanco, violate Mr. Aranda's confrontation rights under the Sixth Amendment to the United States Constitution?

2. Was Mr. Aranda denied effective assistance of counsel by his counsel's failure to object to the admission of hearsay statements that violated his confrontation rights?

3. Does the mandatory \$100 DNA-collection fee authorized under RCW 43.43.7541 violate substantive due process when applied to

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<sup>1</sup> The defendant testified his full name is Juan Carlos Aranda-Sarabia, and his last name is Aranda. RP 514.

defendants who do not have the ability or likely future ability to pay the fine?

**B. STATEMENT OF THE CASE**

The State charged Mr. Aranda with first degree assault and first degree attempted murder for allegedly shooting Mr. Alfredo Mejia-Leyva<sup>2</sup>. CP 131–32. On February 12 about 7:45 pm, Mr. Mejia responded to knocking on his apartment door. Mr. Aranda, who he did not know, was standing there with nothing in his hands and said he'd made a mistake and that he was looking for someone else. RP 195–96, 334–35. Mr. Mejia's temporary roommate, Angelica Gomez-Vibanco, opened the door when a second knocking occurred. RP 331–33, 335, 341–42, 349. Mr. Aranda pointed the weapon in his hand at Mr. Mejia's chest. Mr. Mejia reacted to push the shotgun down and it fired. RP 335–37, 340, 347. He was wounded in the abdomen and spent over one year in the hospital for intensive care and while recuperating from surgeries. CP 205, 233, 338.

This was a one-story apartment building with five units. RP 196. There were streetlights but lots of shadowy dark areas. RP 197–99. Araceli Mazon Flores had been visiting her sister Angela Mazon, who lived in the middle unit. As Ms. Flores was leaving she saw a stranger

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<sup>2</sup> Mr. Mejia-Leyva testified he prefers to be addressed as Mr. Mejia. RP 340.

holding a puppy while standing in front of units 1 and 2. It took two to three minutes to get her children into the car and she drove away. RP 270–72, 277. A few minutes later Ms. Mazon heard a loud noise. After checking to see if something had fallen in the bathroom and what “felt like a long time”<sup>3</sup>, she opened her door. She saw a Hispanic male holding a shotgun in his hand standing between units 1 and 2, facing the apartment doors. When he made a sign to her like, “what’s going on”, she locked her door and retreated with her family into the bathroom. RP 245, 248–52. Ms. Mazon testified the male police had in custody at the scene was the same one she’d seen holding the gun and identified him in court as Mr. Aranda. RP 254–55. Ms. Flores testified Mr. Aranda was the man she’d seen holding the puppy. RP 276.

Curtis Gesser, a groundskeeper who lived at the opposite end of the complex, heard the loud noise. After Ms. Mazon called about seeing a man with a rifle and telling her to call 911, Mr. Gesser peeked out and saw a man trying to get into the first apartment. He followed as the man went around a corner of the building towards the back. The man saw him and

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<sup>3</sup> Ms. Mazon testified three to five minutes passed between hearing the loud boom and opening the front door, that she knew the difference between minutes and seconds, and that normally it would take her 30 seconds to walk that distance. RP 255–57, 259, 261–62.

raised his hand with something stiff wrapped in a shirt or jacket. Mr. Gesser retreated and by the time he got back to his apartment police had arrived. He testified the man the police had in custody at the scene was the same one he saw trying to enter the apartment and who held a long, hard object under some clothing and identified him in court as Mr. Aranda. RP 212, 216–23.

Police responded quickly. They hadn't seen anybody leaving the area and conducted only a limited search for other people. They found Mr. Aranda standing four to six feet in front of the door to Mr. Mejia's apartment, his hands and lower half obscured by some bushes. RP 153–55, 178–79, 195–96, 199, 353, 365, 369, 382–88. Police ordered Mr. Aranda to his knees and he was eventually handcuffed. RP 162–63, 201–02. A pump-action 12-gauge shotgun with Mr. Aranda's DNA on it was found inside the sweater he'd been kneeling on. RP 163, 166–67, 289, 466. A spent casing was found by the front door of the apartment, and the gun had a live round in its chamber and three more in the magazine. RP 293–99, 312.

Beginning earlier that evening and up to the time of the shooting, Mr. Mejia testified Ms. Vibanco was nervous, seemed bothered and somewhat upset or angry with him, her attitude had changed, she was

talking differently to him, and she was texting and calling people. RP 335, 343, 503. After he was shot, he heard her dialing 911, crying and asking for help. RP 346. She never visited Mr. Mejia while he was in the hospital. RP 346. It took a while for Ms. Vibanco to get ready to accompany police to the station for an interview because she was making some cell phone calls. RP 358.

Police obtained search warrants for Ms. Vibanco and Mr. Aranda's cell phone records but after review, did no follow-up investigation. RP 300-01, 308-09. Police had wanted to make sure Ms. Vibanco was not involved because they had spoken to her a number of times and she'd told them several different versions of what happened that day and became increasingly uncooperative. RP 311-13, .511-12.

Mr. Mejia identified Mr. Aranda as the shooter in a photo montage shown to him five months later. RP 302-05, 339. Captain Majetich testified he spoke to Angelica Gomez Vibanco at the scene soon after the incident and when asked, she said "some guy" shot the victim. RP 206. The officer testified he coaxed her to look out the door towards Mr. Aranda, who was handcuffed and being led to a patrol car ten to twenty feet away, asked her if this was the right guy, and that Ms. Vibanco said, "Yeah, yeah, that's him." RP 206-07, 210. Defense counsel did not

object to any of this hearsay testimony as a violation of the Sixth Amendment Confrontation Clause.

Mr. Aranda testified that after a harrowing series of events at his home in nearby Burbank, he and his family left the house in a hurry and accepted a ride to a laundromat in Pasco, Washington, located near the apartment complex. RP 514–21. He and the family puppy separated from his wife and two children, as Mr. Aranda hoped the people he believed to be tailing them would follow him. RP 522–24. Concerned when he lost sight of them and hearing children’s cries nearby, Mr. Aranda ended up near the apartment complex. There was no response to his knock on several doors. RP 524–29, 534–35. He returned to the street but still could not see his family. RP 529–30. When he unwrapped the struggling puppy from his sweater and set both on the ground, the puppy ran back and forth as if playing a game. While chasing the puppy back towards the apartment, Mr. Aranda heard a noise and saw someone running from the complex. Mr. Aranda was looking for his puppy in the bushes of Mr. Mejia’s front yard when police arrived. RP 531–33, 535.

The jury convicted Mr. Aranda as charged and made special findings a firearm was used in commission of the assault and attempted murder. CP 41–42, 43–44. Finding that the counts merged, the court

imposed a low end sentence of 240 months (inclusive of the 60-month firearm enhancement) on the first degree attempted murder conviction. CP 28–29, 33.

Among other legal financial obligations, the court ordered Mr. Aranda to pay a \$100 DNA collection fee. CP 30. This appeal followed. CP 8.

### **C. ARGUMENT**

**1. Mr. Aranda was denied a fair trial and effective assistance of counsel when his counsel failed to object to the admission of damaging hearsay statements of the victim’s roommate, Angelica Gomez Vibanco, which violated the confrontation clause under the Sixth Amendment to the United States Constitution and Article I, section 22 of the Washington Constitution.**

a. Manifest error requires review. Mr. Aranda did not raise the confrontation clause argument at the court below. However, he can raise it for the first time on appeal pursuant to RAP 2.5(a)(3), which provides: "[A] party may raise the following claimed errors for the first time in the appellate court: ... (3) manifest error affecting a constitutional right."

Analyzing alleged constitutional error raised for the first time on appeal involves four steps. First, the reviewing court must make a cursory

determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

Considering the first step, since the issue involves a confrontation clause violation, it violated the Sixth Amendment and is clearly constitutional. Second, the error is manifest because without the hearsay statements, the State had insufficient evidence to convict on the crimes charged. Therefore, the error is manifest and the Court must follow the third step and address the merits of the constitutional issue set forth below. As will be discussed later, the error is not harmless because it clearly changes the outcome of the case.

b. Ineffective assistance is reviewed de novo. The Sixth Amendment and Wash. Const. art. 1, § 22 guarantee effective assistance of

counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063-64, 80 L.Ed.2d 674 (1984); *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984). A claim of ineffective assistance of counsel raises a constitutional issue which appellate courts review de novo. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987), citing *Strickland*, 466 U.S. at 687-88.

To establish ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced him. *Thomas*, 109 Wn.2d at 225. The first prong refers to performance that is not reasonably effective under prevailing professional norms. *State v. Glenn*, 86 Wn. App. 40, 45, 935 P.2d 679 (1997). Prejudice is shown if there is a probability that counsel's errors affected the result. *Glenn*, 86 Wn. App. at 44. The appellant must also show there was no legitimate strategic or tactical explanation for the attorney's conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

c. Hearsay evidence was inadmissible. "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Unless an exception or exclusion applies, hearsay is inadmissible.

ER 802. The use of hearsay impinges upon a defendant's constitutional right to confront and cross-examine witnesses. *State v. Neal*, 144 Wn.2d 600, 607, 30 P.3d 1255 (2001). "A statement is not hearsay if it is used only to show the effect on the listener, *without regard to the truth of the statement.*" *State v. Edwards*, 131 Wn. App. 611, 614, 128 P.3d 631 (2006) (emphasis added).

Here, Captain Majetich testified he spoke to Angelica Gomez Vibanco at the scene soon after the incident and when asked, she said "some guy" shot the victim. RP 206. Without objection the officer testified he coaxed her to look out the door towards Mr. Aranda, who was in custody near the patrol car ten to twenty feet away, asked her if this was the right guy, and that Ms. Vibanco said, "Yeah, yeah, that's him." RP 206-07. The statements were clearly offered to prove the identification of Mr. Aranda by an eyewitness. The State offered Ms. Vibanco's out-of-court statements through Captain Majetich's testimony for no other purpose than to establish the truth of the matter asserted. This court reviews whether or not a statement was hearsay de novo. *Neal*, 144 Wn.2d at 607. The officer's testimony was inadmissible as hearsay under Washington evidence rules. Counsel was ineffective for not objecting to it.

d. Testimonial hearsay evidence violated the confrontation clause.

In addition to violating the hearsay rule, the testimony of Captain Majetich violated the constitutional confrontation clause. An alleged violation of the Confrontation Clause is subject to de novo review. *Lilly v. Virginia*, 527 U.S. 116, 137, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999); *State v. Kirkpatrick*, 160 Wn.2d 873, 881, 161 P.3d 990 (2007). The confrontation clause of the Sixth Amendment provides criminal defendants the right to confront the witnesses against them. U.S. Const. amend. VI; *State v. Davis*, 154 Wn.2d 291, 298, 111 P.3d 844 (2005), *aff'd*, 126 S.Ct. 2266 (2006). Article I, section 22 of the Washington Constitution may offer higher protection than the Sixth Amendment with regard to a defendant's right of confrontation. *State v. Shafer*, 156 Wn.2d 381, 391–92, 128 P.3d 87 (2006), citing *State v. Foster*, 135 Wn.2d 441, 957 P.2d 712 (1998).

The confrontation clause prohibits the admission of an unavailable declarant's out-of-court statement that might otherwise meet one of the exceptions<sup>4</sup> to the general prohibition against hearsay, if the hearsay qualifies as testimonial. *Davis v. Washington*, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006); ER 801(c). A witness' out-of-court statement is testimonial if, in the absence of an ongoing emergency, the

primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Davis*, 547 U.S. at 822, 126 S.Ct. 2266. The admission of testimonial hearsay statements of a witness who does not appear at a criminal trial violates the confrontation clause of the Sixth Amendment unless (1) the witness is unavailable to testify and (2) the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 53–54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *State v. Beadle*, 173 Wn.2d 97, 107, 265 P.3d 863 (2011). Statements made during an interrogation by law enforcement are considered testimonial. *State v. Lazcano*, 188 Wn. App. 338, 367, 354 P.3d 233, 247 (2015), as amended on reconsideration in part (Aug. 20, 2015), citing *Crawford*, 541 U.S. at 53–54, 124 S.Ct. 1354.

e. No finding of unavailability or prior opportunity to cross-examine. The State failed to show Ms. Vibanco was unavailable for confrontation clause purposes. Pursuant to the Sixth Amendment, a prosecutor must show that a witness is unavailable to testify before he or she can resort to presenting the witness's prior testimony. *Crawford*, 541

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<sup>4</sup> Even hearsay with an applicable exception becomes inadmissible in violation of the clause if it is *testimonial* hearsay. *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

U.S. at 68, 124 S.Ct. 1354; *State v. Hachenev*, 160 Wn.2d 503, 158 P.3d 1152 (2007).

Both the United States Supreme Court and the Washington Supreme Court have drawn a distinction between unavailability for confrontation clause purposes, and unavailability for hearsay purposes. See *United States v. Owens*, 484 U.S. 554, 559-63, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988) (discussing first whether declarant's lack of memory allowed confrontation and then discussing whether lack of memory rendered declarant unavailable for purposes of the evidence rules); *State v. Ryan*, 103 Wn.2d 165, 171, 691 P.2d 197 (1984) (distinguishing between unavailability under the hearsay rule and unavailability "in the constitutional sense"); *State v. Price*, 158 Wn.2d 630, 639 n. 5, 146 P.3d 1183 (2006).

A witness's absence from the jurisdiction, without more, is not enough to satisfy the confrontation clause's unavailability requirement. *Barber v. Page*, 390 U.S. 719, 723, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968). "[A] witness is not 'unavailable' ... unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Id.* at 724-25, 88 S.Ct. 1318. The question of unavailability is "one of fact to be determined by the trial judge" and is reviewed for abuse of discretion. *Hachenev*, 160

Wn.2d at 521-22, 158 P.3d 1152, citing *State v. Allen*, 94 Wn.2d 860, 866, 621 P.2d 143 (1980); *State v. DeSantiago*, 149 Wn.2d 402, 411, 68 P.3d 1065 (2003)).

Here, the trial court did not find and the State did not ask for any ruling that Angelica Gomez Vibanco was unavailable. She was listed on the State's witness list (RP 411-12) and the State allowed the court (and defense counsel) to believe she would be called as a witness and to inquire of the venire whether any prospective juror knew her. RP 10-11, 21. Apparently the State knew by at least the day before trial that she would not be testifying. RP 412; CP 122-27. Captain Majetich conveyed the inadmissible hearsay at the beginning of the second day of trial. See 2/19/15 Report of Proceedings. Only at the end of that day—and after another twelve witnesses had testified—did the prosecutor inform all parties that Ms. Vibanco was being uncooperative and wouldn't be called to testify after all. RP 411-14. There was no showing of any timely and good faith effort by the State to procure Ms. Vibanco's presence at the trial. Further, there is no evidence in the record showing that Mr. Aranda had a prior opportunity to cross-examine Ms. Vibanco before his trial. Since there was no showing of unavailability or prior opportunity to cross-

examine, admission of Ms. Vibanco's prior testimonial statements violated Mr. Aranda's constitutional rights of confrontation.

f. Error was not harmless. A confrontation clause error is harmless if the evidence is overwhelming and the violation so insignificant by comparison that an appellate court is persuaded beyond a reasonable doubt that the violation did not affect the verdict. *State v. Vincent*, 131 Wn. App. 147, 154–55, 120 P.3d 120 (2005), citing *Schneble v. Florida*, 405 U.S. 427, 430, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972) ("In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.") and *Harrington v. California*, 395 U.S. 250, 254, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969). Considerations include the importance of the witness's testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. *Vincent*, 131 Wn. App. at 155, 120 P.3d 120, citing *Schneble*, 405 U.S. at 432, 92 S.Ct. 1056.

Here, absent Ms. Vibanco's statements to the police, there was significantly less evidence establishing guilt beyond a reasonable doubt. For example, Mr. Mejia's eyewitness testimony was weakened by the facts he was unable to convey information to police at the scene and his photomontage identification came many months after the shooting. Other witnesses saw Mr. Aranda in the area of the apartment unit(s) but no one saw him shoot a gun. Mr. Aranda told the jury why he was there that night. There was also evidence Ms. Vibanco had apparently changed her versions of what happened that night several times. The improper admission of Ms. Vibanco's extrajudicial statement was not harmless error.

g. Ineffective assistance of counsel. Under the first *Strickland* prong, counsel's performance was deficient. There was no legitimate strategic or tactical explanation for not objecting to the testimonial hearsay evidence. Defense counsel did not object to any of these statements as a confrontation clause violation. Nor did he even once mention *Crawford* during the course of the trial. There is no conceivable strategy in not objecting to clearly damaging testimony. Therefore, trial counsel's performance was clearly deficient.

Under the second *Strickland* prong, counsel’s deficient performance prejudiced Mr. Aranda because there is a reasonable probability the remaining untainted evidence was insufficient to establish his guilt. *Glenn*, 86 Wn. App. at 44.

**2. RCW 43.43.7541 violates substantive due process and is unconstitutional as applied to defendants who do not have the ability or likely future ability to pay the mandatory \$100 DNA collection fee.**

Both the Washington and United States Constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. Const. amends. V, XIV; Const. art. I, § 3. “The due process clause of the Fourteenth Amendment confers both procedural and substantive protections.” *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006) (citation omitted).

“Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.” *Id.* 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 Dep’t of Licensing*, 177 Wn. App. 45, 52–53, 309 P.3d 1221 (2013), citing Russell

W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L.Rev. 625, 625–26 (1992).

Where a fundamental right is not at issue, as is the case here, the rational basis standard applies. *Nielsen*, 177 Wn. App. at 53–54.

To survive rational basis scrutiny, the State must show its regulation is rationally related to a legitimate state interest. *Id.* Although the burden on the State is lighter under this standard, the standard is not meaningless. The United States Supreme Court has cautioned the rational basis test “is not a toothless one.” *Mathews v. DeCastro*, 429 U.S. 181, 185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976). As the Washington Supreme Court has explained, “the court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional.” *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (determining that statute at issue did not survive rational basis scrutiny); *Nielsen*, 177 Wn. App. at 61 (same). Statutes that do not rationally relate to a legitimate State interest must be struck down as unconstitutional under the substantive due process clause. *Id.*

Here, the statute mandates all felony offenders pay the DNA-collection fee. RCW 43.43.7541<sup>5</sup>. This ostensibly serves the State's interest to fund the collection, analysis, and retention of a convicted offender's DNA profile in order to help facilitate future criminal identifications. RCW 43.43.752–.7541. This is a legitimate interest. But the imposition of this mandatory fee upon defendants who cannot pay the fee does not rationally serve that interest.

It is unreasonable to require sentencing courts to impose the DNA-collection fee upon all felony defendants regardless of whether they have the ability or likely future ability to pay. The blanket requirement does not further the State's interest in funding DNA collection and preservation. As the Washington Supreme Court frankly recognized, “the state cannot collect money from defendants who cannot pay.” *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 684 (2015). When applied to indigent defendants, the mandatory fee orders are pointless. It is irrational for the

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<sup>5</sup> RCW 43.43.7541 provides: “Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law. For a sentence imposed under chapter 9.94A RCW, the fee is payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. For all other sentences, the fee is payable by the offender in the same manner as other assessments imposed. The clerk of the court shall transmit eighty percent of the fee collected to the state treasurer for deposit in the state DNA database account created under RCW 43.43.7532, and shall transmit twenty percent of the fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754.”

State to mandate trial courts impose this debt upon defendants who cannot pay.

In response, the State may argue the \$100 DNA collection fee is of such a small amount that most defendants would likely be able to pay.

The problem with this argument, however, is this fee does not stand alone.

The Legislature expressly directs that the fee is “payable by the offender after payment of all other legal financial obligations included in the sentence.” RCW 43.43.7541. Thus the fee is paid only after restitution<sup>6</sup>, the victim’s compensation assessment, and all other LFOs have been satisfied. As such, the statute makes this the least likely fee to be paid by an indigent defendant.

Additionally, the defendant will be saddled with a 12% rate on his unpaid DNA-collection fee, making the actual debt incurred even more onerous in ways that reach far beyond his financial situation. The imposition of mounting debt upon people who cannot pay actually works against another important State interest – reducing recidivism. See *Blazina*, 344 P.3d at 683–84 (discussing the cascading effect of LFOs with an accompanying 12% interest rate and examining the detrimental impact to rehabilitation that comes with ordering fees that cannot be paid).

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<sup>6</sup> Mr. Aranda agreed to pay \$233,697.29 in restitution. CP 30.

When applied to defendants who do not have the ability or likely ability to pay, the mandatory imposition of the DNA-collection fee does not rationally relate to the State's interest in funding the collection, testing, and retention of an individual defendant's DNA. Thus RCW 43.43.7541 violates substantive due process as applied. Based on Mr. Aranda's indigent status, the order to pay the \$100 DNA collection fee should be vacated.

**D. CONCLUSION**

For the reasons stated, this Court should reverse the convictions. Alternatively, the matter should be remanded for resentencing to vacate the order to pay the \$100 DNA collection fee.

Respectfully submitted on December 10, 2015.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on December 10, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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