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Court of Appeals
Division III
State of Washington

No. 33249-7-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

LYZETTE VARGAS,
Defendant/Appellant.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
Honorable Vic L. VanderSchoor, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE.....3

C. ARGUMENT.....5

 1. Before legal financial obligations may be imposed, the court must make an inquiry into whether a person has the present or future ability to pay.....5

 a. This court should exercise its discretion and accept review.....5

 b. The inquiry into whether a person has an ability to pay must be made before a court may impose discretionary legal financial obligations.....8

 c. The inquiry into whether a person has an ability to pay must be made before a court may impose any legal financial obligations, including those the court determines are mandatory.....10

 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.....19

 3. RCW 43.43.7541 violates equal protection because it irrationally requires some defendants to pay a DNA-collection fee multiple times, while others need pay only once.....23

4. The trial court abused its discretion when it ordered Ms. Vargas to submit to another collection of her DNA.....	27
D. CONCLUSION.....	29

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Bush v. Gore</i> , 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000).....	24
<i>Fuller v. Oregon</i> , 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974).....	17
<i>James v. Strange</i> , 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972).....	16
<i>Mathews v. DeCastro</i> , 429 U.S. 181, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976).....	20
<i>Saenz v. Roe</i> , 526 U.S. 489, 119 S. Ct. 1518, 143 L.Ed.2d 689 (1999).....	17

<i>Amunrud v. Bd. of Appeals</i> , 158 Wn.2d 208, 143 P.3d 571 (2006).....	20
<i>Bellevue John Does I-11 v. Bellevue Sch. Dist. #405</i> , 129 Wn. App. 832, 120 P.3d 616 (2005) rev'd in part sub nom. <i>Bellevue John Does I-11 v. Bellevue Sch. Dist. #405</i> , 164 Wn.2d 199, 189 P.3d 139 (2008).....	6
<i>DeYoung v. Providence Med. Ctr.</i> , 136 Wn.2d 136, 960 P.2d 919 (1998).....	21, 25
<i>Jafar v. Webb</i> , 177 Wn.2d 520, 303 P.3d 1042 (2013).....	14, 15, 16, 18
<i>Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 160 Wn. App. 250, 255 P.3d 696 (2011).....	7
<i>Nielsen v. Washington State Dep't of Licensing</i> , 177 Wn. App. 45, 309 P.3d 1221 (2013).....	19, 20, 21
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	27
<i>State v. Blank</i> , 131 Wn.2d 230, 930 P.2d 1213 (1997).....	17, 18
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 19, 22, 23
<i>State v. Bryan</i> , 145 Wn. App. 353, 185 P.3d 1230 (2008).....	24
<i>State v. Conover</i> , 183 Wn.2d 706, 355 P.3d 1093 (2015).....	12
<i>State v. Curry</i> , 118 Wn.2d 911, 829 P.2d 166 (1992).....	9, 12, 13
<i>State v. Gaines</i> , 121 Wn. App. 687, 90 P.3d 1095 (2004).....	24
<i>State v. Lundy</i> , 176 Wn. App. 96, 308 P.3d 755 (2013).....	11, 14
<i>State v. Rohrich</i> , 149 Wn.2d 647, 71 P.3d 638 (2003).....	27
<i>State v. Thorne</i> , 129 Wn.2d 736, 921 P.2d 514 (1994).....	24

Statutes

U.S. Const. amend. 5.....	20
U.S. Const. amend. 14.....	16, 17, 20, 23
Wash. Const., art. 1, § 3.....	16, 20
Wash. Const., art. I, § 12.....	24
Laws of 2002 c 289 § 2, eff. July 1, 2002.....	28
Laws of 2008 c 97, Preamble.....	25
Laws of 2008 c 97 § 2, eff. June 12, 2008.....	28
Laws of 2008 c 97 § 3, eff. June 12, 2008.....	25
RCW 7.68.035.....	11
RCW 9.94A.010.....	11, 19
RCW 9.94A.753.....	12
RCW 10.01.160.....	8, 11, 13, 17, 19
RCW 10.01.160(3).....	5, 6, 8, 11, 13, 17
RCW 36.18.020.....	15
RCW 43.43.752–.7541.....	21
RCW 43.43.754.....	24, 25
RCW 43.43.754(1).....	27
RCW 43.43.754(2).....	26, 27, 28
RCW 43.43.7541 (2008).....	12

RCW 43.43.7541.....	11, 19, 21, 22, 23, 2, 25, 26
RCW 43.43.7541 (2002).....	12
RCW 43.43.754(6) (a).....	28
WAC 446-75-010.....	25
WAC 446-75-060.....	25

Court Rules

GR 34.....	8, 9, 14, 15
comment to GR 34.....	9
GR 34(a).....	14
RAP 2.5(a).....	5

Other Resources

Katherine A. Beckett, Alexes M. Harris, & Heather Evans, Wash. State Minority & Justice Comm'n, <i>The Assessment and Consequences of Legal Financial Obligations in Washington State</i> (2008).....	18
Russell W. Galloway, Jr., <i>Basic Substantive Due Process Analysis</i> , 26 U.S.F. L.Rev. 625 (1992).....	20

A. ASSIGNMENTS OF ERROR

1. The court failed to inquire into Ms. Vargas' ability to pay legal financial obligations prior to their imposition.

2. The court erred in imposing legal financial obligations without making a finding that Ms. Vargas had the current or future ability to pay.

3. The court erred in ordering Ms. Vargas to pay a \$100 DNA-collection fee.

4. The court erred in ordering Ms. Vargas to submit to another DNA collection under RCW 43.43.754.

Issues Pertaining to Assignments of Error

1. In *State v. Blazina*, the Supreme Court determined that trial courts must make an individualized inquiry into a defendant's current and future ability to pay before imposing legal financial obligations under RCW 10.01.160(3). Where the court fails to make such an inquiry, must the matter be remanded for a proper inquiry by the trial court?

2. Before any legal financial obligations may be imposed, the court must inquire into a defendant's current or future ability to pay.

Was it error for the court to impose discretionary LFOs without inquiring into Ms. Vargas' current or future ability to pay?

3. Before any legal financial obligations may be imposed, including those that are mandatory, the court must inquire into a defendant's current or future ability to pay. Was it error for the court to impose the victim assessment penalty, the criminal filing fee and the DNA fee without inquiring into Ms. Vargas' current or future ability to pay?

4. Does the mandatory \$100 DNA-collection fee authorized under RCW 43.43.7541 violate substantive due process when applied to defendants who do not have the ability or likely future ability to pay the fine?

5. Does the mandatory \$100 DNA collection fee authorized under RCW 43.43.7541 violate equal protection when applied to defendants who have previously provided a sample and paid the \$100 DNA collection fee?

6. If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, does the trial court abuse its discretion when it orders a defendant to submit to yet another DNA collection?

B. STATEMENT OF THE CASE

Lyzette Vargas was charged with residential burglary on April 7, 2014, for entering or remaining unlawfully in the dwelling at 210 Jadwin Avenue, Richland, Washington, with the intent to commit a crime. CP 1. At Ms. Vargas' trial, the jury heard from Michelle Marcum, the owner of the property, and Christine Vincent, a neighbor who observed events after the burglary was interrupted. RP¹ 22–70, 77–83. The State also presented testimony of officers who were at the scene or involved in the arrest of Ms. Vargas. RP 71–76, 85–90

Ms. Vargas presented the testimony of her mother, Martha Macias and a friend, Gerald Kerby. RP 92–97, 98–110. Ms. Vargas chose not to testify. Ms. Vargas was found guilty of residential burglary. CP 90.

At sentencing Ms. Vargas requested a drug offender sentencing alternative or alternatively a low-end sentence to run concurrent with an existing 80-month sentence being appealed. RP 140. The court imposed a high-end sentence of 84 months, to run consecutive to the prior sentence. RP 141–42.

¹ The March 2–3, 2015 trial proceedings and March 24, 2015 sentencing hearing are transcribed by court reporter John McLaughlin in one consecutively-numbered volume and will be referred to as “RP ____”.

The court imposed discretionary costs of \$2,048² and mandatory costs of \$800³, for a total Legal Financial Obligation (“LFO”) of \$2,848. No restitution was imposed. The Judgment and Sentence contained the following language:

¶ 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. ...
The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change.

CP 94. Ms. Vargas did not object to the imposition of the LFOs.

The court did not inquire into Ms. Vargas’ financial resources or consider the burden payment of LFOs would impose on her. RP 141–42. The court asked, “And you’re employable, aren’t you”, to which Ms. Vargas responded, “Yes.” RP 141. The court ordered Ms. Vargas to pay unspecified payments towards the LFOs beginning immediately and ordered that up to \$50 per month “shall ... be taken from any income the defendant earns while in the custody of the Department of Corrections.”

CP 95, 96. The court further ordered that “[a]n award of costs on appeal against the defendant may be added to the total financial obligations.

RCW 10.73.160.” CP 95. Ms. Vargas timely appealed. CP 107–08.

² \$500 fine, \$60 sheriff service fee, \$250 jury demand fee, \$43 witness fee, \$700 fees for court-appointed attorney, and \$495 for special cost reimbursement. CP 95, 103.

C. ARGUMENT

1. Before legal financial obligations may be imposed, the court must make an inquiry into whether a person has the present or future ability to pay.⁴

a. This court should exercise its discretion and accept review.

Ms. Vargas did not make this argument below. However, the legislature has mandated that a sentencing court “shall not order a defendant to pay costs unless the defendant is or will be able to pay them. RCW 10.01.160(3). In *Blazina*, the Supreme Court determined that trial courts must make an individualized inquiry into a defendant’s current and future ability to pay before imposing LFOs. 182 Wn.2d 827, 830, 833–34, 344 P.3d 680 (2015). Even though counsel had not raised the issue below, the court felt compelled to accept review under RAP 2.5(a) because it found that the pernicious consequences of “broken LFO systems” on indigent defendants “demand” that it reach the issue, even though it was not raised in the trial court. *Blazina*, 182 Wn.2d at 833–34.

Public policy favors direct review by this Court. Indigent defendants who are saddled with wrongly imposed LFOs have many

³ \$500 victim assessment, \$200 criminal filing fee, and \$100 DNA collection fee. CP 94–95, 103.

⁴ Assignments of Error 1 and 2.

“reentry difficulties” that ultimately work against the State’s interest in accomplishing rehabilitation and reducing recidivism. *Blazina*, 182 Wn.2d at 835–37. Availability of a statutory remission process down the road does little to alleviate the harsh realities incurred by virtue of LFOs that are improperly imposed at the outset. As the *Blazina* Court bluntly recognized, one societal reality is “the state cannot collect money from defendants who cannot pay.” *Id.* at 837. Requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal is a financially wasteful use of administrative and judicial process. A more efficient use of state resources would result from this court’s remand back to the sentencing judge who is already familiar with the case to make the ability to pay inquiry.

As a final matter of public policy, this Court has the immediate opportunity to expedite reform of the broken LFO system. This Court should embrace its obligation to uphold and enforce the Washington Supreme Court’s decision that RCW 10.01.160(3) requires the sentencing judge to make an individualized inquiry on the record into the defendant’s current and future ability to pay before the court imposes LFOs. *Blazina*, 182 Wn.2d at 839; see also *Bellevue John Does 1-11 v. Bellevue Sch. Dist.*

#405, 129 Wn. App. 832, 867-68, 120 P.3d 616, 634 (2005) rev'd in part sub nom. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 189 P.3d 139 (2008) (The principle of stare decisis—“to stand by the thing decided”—binds the appellate court as well as the trial court to follow Supreme Court decisions). This requirement applies to the sentencing court in Ms. Vargas’ case regardless of her failure to object. See, *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 259-60, 255 P.3d 696, 701 (2011) (“Once the Washington Supreme Court has authoritatively construed a statute, the legislation is considered to have always meant that interpretation.”) (Citations omitted).

The sentencing court’s signature on a judgment and sentence with boilerplate language stating that it engaged in the required inquiry is wholly inadequate to meet the requirement. *Blazina*, 182 Wn.2d at 838. Ms. Vargas’s March 24, 2015, sentencing occurred twelve days after the *Blazina* opinion was issued on March 12, 2015. Post-*Blazina*, one would expect trial courts to fulfill their statutory mandate to make an appropriate inquiry on the record. The court below did not inquire. Ms. Vargas respectfully submits that to ensure she and all indigent defendants are treated as the LFO statute requires, this Court should reach the

unpreserved error and accept review. *Blazina*, 182 Wn.2d 827, 344 P.3d at 687 (FAIRHURST, J. (concurring in the result)).

b. The inquiry into whether a person has an ability to pay must be made before a court may impose discretionary legal financial obligations.

The court may order a defendant to pay costs under RCW

10.01.160. However, the statute also provides “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” RCW

10.01.160(3).

A trial court has a statutory obligation to make an individualized inquiry into a defendant’s current and future ability to pay before the court imposes LFOs. *Blazina*, 182 Wn.2d at 830. This inquiry “also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.” *Id.* at 839. *Blazina* further held trial courts should look to the comment in court rule GR 34 for guidance. *Id.* at 838–39. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists

ways that a person may prove indigent status. *Id.* at 838 (citing GR 34). For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (citing comment to GR 34 listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.* at 838–39. Although the ways to establish indigent status remain nonexhaustive, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs. *Id.* at 839.

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make formal specific findings of ability to pay: "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). However, the judgment and sentence contains only a boilerplate statement that the trial court has "considered" Ms. Vergas' present or future ability to pay LFOs. The generic statement does not even purport to "find" she has such ability. After *Blazina*, the trial court "must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required

inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay." *Blazina*, 182 Wn.2d at 839.

The record does not show the court took into account her financial resources and the potential burden of imposing discretionary LFOs including any future "award of costs on appeal" on Ms. Vargas. The court failed to follow statutory mandate in imposing the LFOs. The matter should be remanded for the sentencing court to make an individualized inquiry into Ms. Vargas' current and future ability to pay before imposing discretionary LFOs. Because it would be premature to determine the ability or lack of ability to pay any future award of appellate costs, the court's present determination that the "award of costs on appeal" may be added to the Judgment and Sentence must be stricken.

c. The inquiry into whether a person has an ability to pay must be made before a court may impose any legal financial obligations, including those the court determines are mandatory.

There is good reason for the requirement to consider ability to pay prior to taxing money obligations. Imposing LFOs on indigent defendants causes significant problems, including "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *Blazina*, 182 Wn.2d at 835. LFOs accrue

interest at a rate of 12%, so even a person who manages to pay \$25 per month toward LFOs will owe more money ten years after conviction than when the LFOs were originally imposed, even when the minimum amount is imposed by the trial court. *Id.* at 836. This, in turn, causes background checks to reveal an “active record,” producing “serious negative consequences on employment, on housing, and on finances.” *Id.* at 837. All of these problems lead to increased recidivism. *Id.* at 837. Thus, a failure to consider a defendant’s ability to pay not only violates the plain language of RCW 10.01.160(3), but also contravenes the purposes of the Sentencing Reform Act, which include facilitating rehabilitation and preventing reoffending. *See* RCW 9.94A.010.

The State may argue that the court properly imposed these costs without regard to Ms. Vargas’ ability to pay because the statutes in question use the word “shall” or “must.” *See* RCW 7.68.035 (penalty assessment “shall be imposed”); RCW 43.43.7541 (every felony sentence “must include” a DNA fee); *State v. Lundy*, 176 Wn. App. 96, 102–03, 308 P.3d 755 (2013). But these statutes must be read in tandem with RCW 10.01.160, which requires courts to inquire about a defendant’s financial status and refrain from imposing costs on those who cannot pay. RCW 10.01.060(3); *Blazina*, 182 Wn.2d at 830, 838. Read together, these

statutes mandate imposition of the above fees upon those who can pay and require that they not be ordered for indigent defendants.

When the legislature means to depart from this presumptive process, it makes the departure clear. The restitution statute, for example, not only states that restitution “shall be ordered” for injury or damage absent extraordinary circumstances, but also states that “the court *may not* reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount.” RCW 9.94A.753 (emphasis added). This clause is absent from other LFO statutes, indicating that sentencing courts are to consider ability to pay in those contexts. See *State v. Conover*, 183 Wn.2d 706, 712–13, 355 P.3d 1093 (2015) (the legislature's choice of different language in different provisions indicates a different legislative intent).⁵

More than 20 years ago the Supreme Court did state that the Victim Penalty Assessment was mandatory notwithstanding a defendant’s inability to pay. *Curry*, *supra*. But that case addressed a defense argument that the victim penalty assessment was unconstitutional. *Curry*, 118 Wn.2d at 917-18. The Court simply assumed that the statute mandated

⁵ The legislature did amend the DNA statute to remove consideration of “hardship” at the time the fee is imposed. Compare RCW 43.43.7541 (2002) with RCW 43.43.7541 (2008). But it did not add a clause precluding waiver of the fee for those who cannot pay

imposition of the penalty on indigent and solvent defendants alike: “The penalty is mandatory. In contrast to RCW 10.01.160, no provision is made in the statute to waive the penalty for indigent defendants.” *Id.* at 917 (citation omitted). That portion of the opinion is arguably dictum because it does not appear petitioners argued that RCW 10.01.160(3) applies to the victim penalty assessment, but simply assumed it did not.

Blazina supersedes *Curry* to the extent they are inconsistent. The Court in *Blazina* repeatedly described its holding as applying to “LFOs,” not just to a particular cost. *See Blazina*, 182 Wn.2d at 830 (“[W]e reach the merits and hold that a trial court has a statutory obligation to make an individualized inquiry into a defendant’s current and future ability to pay before the court imposes LFOs.”); *id.* at 839 (“We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant’s current and future ability to pay before the court imposes LFOs.”). Further, when listing the LFOs imposed on the two defendants at issue, the court cited the same LFOs Ms. Vargas challenges here: Victim Penalty Assessment, DNA fee, and criminal filing fee. *Id.* at 831 (discussing defendant *Blazina*); *id.* at 832 (discussing defendant *Paige-Colter*). Defendant *Paige-Colter* had only one

it at all. In other words, the legislature did not explicitly exempt this statute from the requirements of RCW 10.01.160(3).

other legal financial obligation applied to him (attorney's fees), and defendant Blazina had only two (attorney's fees and extradition costs). See *id.* If the Court were limiting its holding to a minority of the LFOs imposed on these defendants, it presumably would have made such limitation clear.

It also does not appear that the Supreme Court has ever held that the DNA fee is exempt from the ability-to-pay inquiry. Although the court so held in *Lundy*, it did not have the benefit of *Blazina*, which now controls. Compare *Lundy*, 176 Wn. App. at 102–03 with *Blazina*, 182 Wn.2d at 830–39.

GR 34, which was adopted at the end of 2010, also supports Ms. Vargas' position. That rule provides in part, "Any individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief from a judicial officer in the applicable court." GR 34(a).

The Supreme Court applied GR 34(a) in *Jafar v. Webb*, 177 Wn.2d 520, 303 P.3d 1042 (2013). There, a mother filed an action to obtain a parenting plan, and sought to waive all fees based on indigence. *Id.* at 522. The trial court granted a partial waiver of fees, but ordered Jafar to

pay \$50 within 90 days . *Id.* at 523. The Supreme Court reversed, holding the court was required to waive all fees and costs for indigent litigants. *Id.* This was so even though the statutes at issue, like those at issue here, mandate that the fees and costs “shall” be imposed. *See* RCW 36.18.020.

The Court noted that both the plain meaning and history of GR 34, as well as principles of due process and equal protection, required trial courts to waive all fees for indigent litigants. *Jafar*, 177 Wn.2d at 527–30. If courts merely had the discretion to waive fees, similarly situated litigants would be treated differently. *Id.* at 528. A contrary reading “would also allow trial courts to impose fees on persons who, in every practical sense, lack the financial ability to pay those fees.” *Id.* at 529. Given *Jafar*’s indigence, the Court said, “We fail to understand how, as a practical matter, *Jafar* could make the \$50 payment now, within 90 days, or ever.” *Id.* That conclusion is even more inescapable for criminal defendants, who face barriers to employment beyond those others endure. *See Blazina*, 182 Wn.2d at 837.

Although GR 34 and *Jafar* deal specifically with access to courts for indigent civil litigants, the same principles apply here. Notably, the Supreme Court discussed GR 34 in *Blazina* and urged trial courts in

criminal cases to reference that rule when determining ability to pay.

Blazina, 182 Wn.2d at 838.

Furthermore, to construe the relevant statutes as precluding consideration of ability to pay would raise constitutional concerns. U.S. Const. amend. XIV; Const. art. I, § 3. To hold that mandatory costs and fees must be waived for indigent civil litigants but may not be waived for indigent criminal litigants would run afoul of the Equal Protection Clause. See *James v. Strange*, 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972) (holding Kansas statute violated Equal Protection Clause because it stripped indigent criminal defendants of the protective exemptions applicable to civil judgment debtors).

Equal Protection problems also arise from the arbitrarily disparate handling of the “criminal filing fee” across counties. The fact that some counties view statewide statutes as requiring waiver of the fee for indigent defendants and others view the statutes as requiring imposition regardless of indigency is not a fair basis for discriminating against defendants in the latter type of county. See *Jafar*, 177 Wn.2d at 528–29 (noting that “principles of due process or equal protection” guided the court’s analysis and recognizing that failure to require waiver of fees for indigent litigants “could lead to inconsistent results and disparate treatment of similarly

situated individuals”). Such disparate application across counties not only offends equal protection, but also implicates the fundamental constitutional right to travel. *Cf. Saenz v. Roe*, 526 U.S. 489, 505, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999) (striking down California statute mandating different welfare benefits for long-term residents and those who had been in the state for less than a year, as well as different benefits for those in the latter category depending on their state of origin).

Treating the costs at issue here as non-waivable would also be constitutionally suspect under *Fuller v. Oregon*, 417 U.S. 40, 45-46, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). There, the Supreme Court upheld an Oregon costs statute that is similar to RCW 10.01.160, noting that it required consideration of ability to pay before imposing costs and that costs could not be imposed upon those who would never be able to repay them. See *id.* Thus, under *Fuller*, the Fourteenth Amendment is satisfied if courts read RCW 10.01.160(3) in tandem with the more specific cost and fee statutes, and consider ability to pay before imposing LFOs.

Although the Court in *Blank* rejected an argument that the Constitution requires consideration of ability to pay at the time appellate costs are imposed, subsequent developments have undercut its analysis. See *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997). The *Blank*

Court noted that due process prohibits imprisoning people for inability to pay fines, but assumed that LFOs could still be *imposed* on poor people because “incarceration would result only if failure to pay was willful” and not due to indigence. *Id.* at 241. Unfortunately, reality has proven this assumption to be untrue. Indigent defendants in Washington are regularly imprisoned because they are too poor to pay LFOs. Katherine A. Beckett, Alexes M. Harris, & Heather Evans, Wash. State Minority & Justice Comm’n, *The Assessment and Consequences of Legal Financial Obligations in Washington State*, 49-55 (2008) (citing numerous accounts of indigent defendants jailed for inability to pay).⁶

The risk of unconstitutional imprisonment for poverty is very real—certainly as real as the risk that Ms. Jafar’s civil petition would be dismissed due to failure to pay. See *Jafar*, 177 Wn.2d at 525 (holding Jafar’s claim was ripe for review even though trial court had given her 90 days to pay \$50 and had neither dismissed her petition for failure to pay nor threatened to do so). It has become clear that courts must consider ability to pay at sentencing in order to avoid due process problems.

Finally, imposing LFOs on indigent defendants violates substantive due process because such a practice is not rationally related to a legitimate

⁶ Available at:

government interest. See *Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 52–53, 309 P.3d 1221 (2013) (citing test). Ms. Vargas concedes the government has a legitimate interest in collecting the costs and fees at issue. But imposing costs and fees on impoverished people like Ms. Vargas is not rationally related to the goal, because “the state cannot collect money from defendants who cannot pay.” *Blazina*, 182 Wn.2d at 837. Moreover, imposing LFOs on impoverished defendants runs counter to the legislature’s stated goals of encouraging rehabilitation and preventing recidivism. See RCW 9.94A.010; *Blazina*, 182 Wn.2d at 837.

For all of the stated reasons, the various cost and fee statutes must be read in tandem with RCW 10.01.160. Courts must not impose any LFOs on an indigent defendant without first inquiring into whether the person has an ability to pay.

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.⁷

Both the Washington and United States Constitutions mandate that no person may be deprived of life, liberty, or property without due process

http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

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*, 177 Wn. App. at 52–53 (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,

⁷ Assignment of Error 3.

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 43.43.7541⁸. 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.

⁸ 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.”

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." *Blazina*, 182 Wn.2d 827, 344 P.3d at 684. When applied to indigent defendants, the mandatory fee orders are pointless. It is irrational for the 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, 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).

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 Ms. Vargas’ indigent status, the order to pay the \$100 DNA collection fee should be vacated.

3. RCW 43.43.7541 violates equal protection because it irrationally requires some defendants to pay a DNA-collection fee multiple times, while others need pay only once.⁹

The equal protection clauses of the state and federal constitutions require that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. U.S. Const. amend. XIV;

⁹ Assignment of Error 3.

Const., art. I, § 12; *Bush v. Gore*, 531 U.S. 98, 104–05, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000); *State v. Thorne*, 129 Wn.2d 736, 770–71, 921 P.2d 514 (1994). A valid law administered in a manner that unjustly discriminates between similarly situated persons, violates equal protection. *State v. Gaines*, 121 Wn. App. 687, 704, 90 P.3d 1095 (2004) (citations omitted).

Before an equal protection analysis may be applied, a defendant must establish he is similarly situated with other affected persons. *Gaines*, 121 Wn. App. at 704. In this case, the relevant group is all defendants subject to the mandatory DNA-collection fee under RCW 43.43.7541. Having been convicted of a felony, Ms. Vargas is similarly situated to other affected persons within this affected group. See RCW 43.43.754, .7541.

On review, where neither a suspect/semi-suspect class nor a fundamental right is at issue, a rational basis analysis is used to evaluate the validity of the differential treatment. *State v. Bryan*, 145 Wn. App. 353, 358, 185 P.3d 1230 (2008). That standard applies here.

Under rational basis scrutiny, a legislative enactment that, in effect, creates different classes will survive an equal protection challenge only if: (1) there are reasonable grounds to distinguish between different classes of

affected individuals; and (2) the classification has a rational relationship to the proper purpose of the legislation. *DeYoung*, 136 Wn.2d at 144. Where a statute fails to meet these standards, it must be struck down as unconstitutional. *Id.*

The Legislature has declared that collection of DNA samples and their retention in a DNA database are important tools in “assist[ing] 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.” Laws of 2008 c 97, Preamble. The DNA profile from a convicted offender’s biological sample is entered into the Washington State Patrol’s DNA identification system (database) and retained until expunged or no longer qualified to be retained. WAC 446-75-010; WAC 446-75-060. Every sentence imposed for a felony crime after June 12, 2008, must include a mandatory fee of \$100. RCW 43.43.754, .7541 (Laws of 2008, c 97 § 3 (eff. June 12, 2008)).

The purpose of RCW 43.43.754 is to fund the collection, analysis, and retention of an individual felony offender’s identifying DNA profile for inclusion in a database of DNA records. Once a defendant’s DNA is collected, tested, and entered into the database, subsequent collections are

unnecessary. This is because DNA – for identification purposes – does not change. The statute itself recognizes this, expressly stating it is unnecessary to collect more than one sample. RCW 43.43.754(2). There is no further biological sample to collect with respect to defendants who have already had their DNA profiles entered into the database.

Here, RCW 43.43.7541 does not apply equally to all felony defendants because those who are sentenced more than once have to pay the fee multiple times. This classification is unreasonable because multiple payments are not rationally related to the legitimate purpose of the law, which is to fund the collection, analysis, and retention of an individual felony offender's identifying DNA profile.

RCW 43.43.7541 discriminates against felony defendants who have previously been sentenced by requiring them to pay multiple DNA collection fees, while other felony defendants need only pay one DNA collection fee. Ms. Vargas was presumably ordered to pay \$100 DNA fees at the time of her five prior felony sentencings occurring after June 12, 2008, as well as in the present sentencing. CP 93, 95. The mandatory requirement that the fee be collected from such defendants upon each sentencing is not rationally related to the purpose of the statute. As such, RCW 43.43.7541 violates equal protection. The DNA-collection fee order

must be vacated.

4. The trial court abused its discretion when it ordered Ms. Vargas to submit to another collection of her DNA.¹⁰

A trial court abuses its discretion if its decision is “manifestly unreasonable,” based on “untenable grounds,” or made for “untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). “A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

RCW 43.43.754(1) requires a biological sample “must be collected” when an individual is convicted of a felony offense. RCW 43.43.754(2) provides: “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.” Thus, the trial court has discretion as to whether to order the collection of an offender’s DNA under such circumstances.

It is manifestly unreasonable for a sentencing court to order a defendant’s DNA to be collected pursuant to RCW 43.43.754(1) where the

¹⁰ Assignment of Error 4.

record discloses that the defendant's DNA has already been collected. The Legislature recognizes that collecting more than one DNA sample from an individual is unnecessary. It is also a waste of judicial, state, and local law enforcement resources when sentencing courts issue duplicative DNA collection orders.

Here, Ms. Vargas' DNA was previously collected pursuant to the statute. She had seven prior felony convictions sentenced after July 1, 2002. CP 93. These prior convictions each required collection of a biological sample for purposes of DNA identification analysis pursuant to the current statute. RCW 43.43.754(6)(a); Laws of 2008 c 97 § 2, eff. June 12, 2008; Laws of 2002 c 289 § 2, eff. July 1, 2002. There is no evidence suggesting her DNA had not previously been collected and placed in the DNA database. Ms. Vargas fell within the parameters of RCW 43.43.754(2) and a subsequent DNA sample was not required. Under these circumstances, it was manifestly unreasonable for the sentencing court to order her to submit to another collection of her DNA. CP 96. The collection order must be reversed.

D. CONCLUSION

For the reasons stated, the matter should be remanded for a hearing on whether Ms. Vargas' LFOs should be waived, and for resentencing to strike the premature award of future appellate costs and to vacate the orders to pay the \$100 DNA collection fee and submit an additional biological sample for DNA identification

Respectfully submitted on January 4, 2016.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on January 4, 2016, 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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