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Court of Appeals  
Division III  
State of Washington  
No. 33249-7-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON,

Respondent

v.

LYZETTE VARGAS,

Appellant

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR BENTON COUNTY

NO. 14-1-00433-1

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BRIEF OF RESPONDENT

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## I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. **The trial court did not err in concluding the defendant had the present or likely future ability to pay her discretionary legal financial obligations.**
- B. **RCW 43.43.7541 does not violate substantive due process and is not unconstitutional as applied to the defendant because the imposition of the \$100 DNA collection fee imposed on all adult offenders is rationally related to a legitimate State interest.**
- C. **RCW 43.43.7541 does not violate equal protection because the imposition of the \$100 DNA collection fee imposed on all adult offenders following every sentence is rationally related to a legitimate State interest.**
- D. **The trial court did not abuse its discretion when it ordered the defendant to submit to another collection of her DNA.**

## II. STATEMENT OF FACTS

On April 5, 2014, officers responded to a report of an interrupted burglary in Richland, Washington. 4RP<sup>1</sup> at 3. When officers arrived at the scene, they contacted the home owner, Michelle Marcum. *Id.* at 4. Ms. Marcum stated that she arrived home at approximately noon and noticed a ladder lying by her back door as well as broken glass. *Id.* at 25-26. After unlocking her back door, she saw broken glass all over the floor. *Id.* at 26. As she walked in, she heard noise in the living room and found a woman trying to get out of the front door. *Id.* at 29. The woman, later identified as

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<sup>1</sup> There are four volumes of the Verbatim Report of Proceedings referenced as follows: 1RP- July 23, 2014, August 13, 2014, August 27, 2014, and September 3, 2014; 2RP- September 10, 2014; 3RP- November 5, 2014; 4RP- March 2, 2015, March 3, 2015, and March 24, 2015.

the defendant, Lyzette Vargas, was wearing clothing and holding onto a handbag that belonged to Ms. Marcum. *Id.* at 36. A scuffle ensued between the defendant and Ms. Marcum when the defendant tried to flee. *Id.* at 37. As they ran through Ms. Marcum's neighbor's yard, Ms. Marcum lost visual contact of the defendant. *Id.* at 38.

After officers received information on the suspect's identity, they showed Ms. Marcum a picture of the defendant. *Id.* at 73. Ms. Marcum confirmed to officers that the defendant was the individual inside her home. *Id.*

At trial, Ms. Marcum identified the defendant as the woman who inside her home. *Id.* at 34. She also testified that countless items in her home were either missing or damaged. *Id.* at 41-66. Christine Vincent, Ms. Marcum's neighbor, testified to the events she observed after the burglary was interrupted. *Id.* at 77-83. The State also presented testimony of officers who were at the scene or involved in the arrest of the defendant. *Id.* at 71-76, 85-90.

The defendant was found guilty of residential burglary and sentenced to a total of 84 months total confinement, to run consecutive with a prior sentence. *Id.* at 141; CP 90, 96. 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 statute will change.

CP 94. The defendant did not object to the imposition of the LFOs.

At sentencing, the trial court inquired whether the defendant was employable, and the defendant indicated she was. 4RP at 141. The trial court imposed discretionary costs of \$2,048<sup>2</sup> and mandatory costs of \$800<sup>3</sup>. *Id.*; CP at 94-95. No restitution was imposed. 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 96.

### III. ARGUMENT

- A. A review under RAP 2.5(a) is not appropriate because sufficient facts on the record support a finding of ability to pay.**
- 1. This Court should exercise its discretion and deny review.**

The appellate court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). A party may present a ground for affirming a trial court decision which was not presented to the trial

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

court if the record has been sufficiently developed to fairly consider the ground. *Plein v. Lackey*, 149 Wn.2d 214, 67 P.3d 1061 (2003).

The defendant contends an inadequate inquiry under *Blazina* can be raised for the first time on review under RAP 2.5(a)(2) because insufficient facts support the finding of ability to pay; however, a review under RAP 2.5(a) is not appropriate because sufficient facts on the record support a finding of ability to pay. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

A defendant who makes no objection to the imposition of discretionary legal financial obligations (“LFOs”) at sentencing is not automatically entitled to review. *Blazina*, 182 Wn.2d at 832. RAP 2.5(a)(2) permits errors to be raised for the first time upon review when the error alleges “failure to establish facts upon which relief can be granted . . . .” The exception applies where the proof of particular facts at trial is required to sustain a claim. *Mukilteo Ret. Apts., LLC v. Mukilteo Investors LP*, 176 Wn. App. 244, 246, 310 P.3d 814 (2013). This exception “is fitting inasmuch as ‘[a]ppeal is the first time sufficiency of evidence may realistically be raised.’” *Roberson v. Perez*, 156 Wn.2d 33, 40, 123 P.3d 844 (2005) (quoting *State v. Hickman*, 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998)).

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<sup>3</sup> \$500 victim assessment, \$200 criminal filing fee, and \$100 DNA collection fee. CP 94-

The Court in *Blazina* noted that some challenges raised for the first time on appeal are appropriate because the error, if permitted to stand, would create inconsistent sentences for the same crime and because some defendants would receive unjust punishment simply because his or her attorney failed to object. 182 Wn.2d at 834. However, allowing challenges to discretionary LFO orders would not promote sentencing uniformity in the same way. *Id.* The Court held that the trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on particular facts of the defendant's case. *Id.* at 834.

Following the *Blazina* decision, in *State v. Lyle*, 188 Wn. App. 848, 355 P.3d 327 (2015), the Court determined that Lyle's failure to challenge the trial court's imposition of LFOs at his sentencing precluded him from raising the issue on appeal. *Lyle*, 188 Wn. App. at 852.

*Lyle* is directly analogous to the present case. Here, not only did the defendant fail to challenge the trial court's imposition of LFOs at her sentencing, she indicated that she was employable. RP at 141. While the appellate court has the discretion to review the matter, the trial court properly considered the defendant's current and future ability to pay her LFOs. The trial court's findings are supported by substantial evidence in the record; therefore, a review under RAP 2.5(a) is not appropriate.

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95, 103.

**2. The trial court sufficiently inquired into the defendant's present and likely future ability to pay before imposing discretionary legal financial obligations.**

The defendant requests this Court reverse the imposition of LFOs and remand her case back to the sentencing court to make an individualized inquiry into the defendant's ability to pay discretionary LFOs. The trial court imposed LFOs, including a \$500 fine, \$100 DNA collection fee; \$60 sheriff service fee, \$250 jury demand fee, \$43 witness fee, \$700 court-appointed attorney fee, and \$495 special cost reimbursement. CP 94-95, 103; 4RP at 141. The \$500 victim assessment fee and \$200 criminal filing fee are mandatory, regardless of the defendant's ability to pay. CP 94, 103. Therefore, at issue is whether the trial court properly inquired into the defendant's present and future ability to pay the \$2,048 court costs.

Under RCW 10.01.160(3), the court can order a defendant convicted of a felony to repay court costs as part of the judgment and sentence. However, the sentencing court cannot order a defendant to pay court costs "unless the defendant is or will be able to pay them." RCW 10.01.160(3). In making that determination, the sentencing court must take into consideration the financial resources of the defendant and the burden imposed by ordering the payment of court costs. *Id.*

The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991). "A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all the evidence leads to a 'definite and firm conviction that a mistake has been committed.'" *Schryvers v. Coulee Cmty. Hosp.*, 138 Wn. App. 648, 654, 158 P.3d 113 (2007) (quoting *Wenatchee Sportsmen Ass'n v. Chelan Cnty.*, 141 Wn.2d 169, 176, 4 P.2d 123 (2000)).

In *Baldwin*, the Court determined that the burden imposed by RCW 10.01.160 was met by a single sentence in a presentence report that the defendant did not object to. 63 Wn. App. at 311. The presentence report contained the following statement, "Mr. Baldwin describes himself as employable, and should be held accountable for legal financial obligations normally associated with this offense." *Id.* Baldwin made no objection to this assertion at the time of sentencing. *Id.* Therefore, the Court determined that when the presentencing report establishes a factual basis for the defendant's future ability to pay and the defendant does not object, the requirement of inquiry into the ability to pay is satisfied. *Id.* at 312.

In *State v. Bertrand*, the record revealed that the trial court failed to consider when the defendant could pay legal financial obligations and also showed that “in light of Bertrand’s disability, her ability to pay LFOs now or in the near future is arguably in question.” *State v. Bertrand*, 165 Wn. App. 393, 404 n.15, 267 P.3d 511 (2011). Therefore, under *Bertrand*, a repayment obligation may not be imposed “if it appears there is no likelihood the defendant’s indigency will end.” *State v. Lundy*, 176 Wn. App. 96, 104, 308 P.3d 755 (2013).

In *Blazina*, the Supreme Court of Washington ruled that trial courts must “do more than sign a judgment and sentence without boilerplate language stating that it engaged in the required inquiry.” *Blazina*, 182 Wn.2d at 838. Instead “[t]he record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay.” *Id.* This inquiry includes consideration of factors such as the defendant’s financial resources, incarceration, and other debts, including restitution. *Id.* 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).

In the present case, while page four of the judgment and sentence does not reflect a formal specific finding regarding the defendant's ability to pay, the trial court sufficiently inquired into the defendant's present or future ability to pay on the record. The discretionary LFOs imposed in this case were \$2,048. CP 94-95, 103; 4RP at 141. Contrary to the defendant's assertions, evidence in the record supports the trial court's finding that she had the present and future ability to pay these fees. In addition, during sentencing, the trial court asked, "And [you're] employable, aren't you[?]" to which the defendant responded, "Yes." 4RP at 141. The defendant did not object to the imposition of LFOs, nor did she reveal any other debts that would prevent her from paying her LFOs. Unlike the defendant in *Bertrand*, the defendant has no known disabilities that preclude the possibility of her working in the future. *Bertrand*, 165 Wn. App. at 404 n.15.

Moreover, there is nothing in the record to suggest that the defendant's indigency would extend indefinitely. Unlike the situation in *Bertrand* where the evidence suggested that there was no likelihood that the disabled defendant could begin payment of LFOs within 60 days of entry of the judgment and sentence while still incarcerated, the situation here more closely approximates that of the defendant in *Baldwin*.

The trial court's inquiry addressed the factors specifically identified by the *Blazina* Court as mandatory. As such, this Court should affirm the trial court's imposition of the discretionary legal financial obligations.

**3. The trial court need not inquire into whether a person has the present or future ability to pay before imposing mandatory legal financial obligations.**

For mandatory LFOs, the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these obligations regardless of a defendant's indigency. *Lundy*, 176 Wn. App. at 102. For victim restitution, victim assessments, DNA fees, and criminal filing fees, the defendant's ability to pay should not be taken into account. *Id.*; see, e.g., *State v. Kuster*, 175 Wn. App. 420, 306 P.3d 1022 (2013). Mandatory obligations are constitutional so long as "there are sufficient safeguards in the current sentencing scheme to prevent imprisonment of indigent defendants." *Curry*, 118 Wn.2d at 918.

[A] victim assessment of \$500 is required by RCW 7.68.035(1), a \$100 DNA collection fee is required by RCW 43.43.7541, and a \$200 criminal filing fee is required by RCW 36.18.020(2)(h), irrespective of the defendant's ability to pay. See *State v. Curry*, 62 Wash.App. 676, 680-81, 814 P.2d 1252 (1991), *aff'd*, 118 Wash.2d 911, 829 P.2d 166 (1992); *State v. Thompson*, 153 Wash.App. 325, 336, 223 P.3d 1165 (2009).

*Lundy*, 176 Wn. App. at 103.

Here, the trial court imposed mandatory LFOs, including a \$500 victim assessment, \$200 criminal filing fee, and \$100 DNA collection fee. CP 94-95, 103. While the trial court conducted an individualized inquiry into the defendant's ability to pay, they were not required to in order to impose the mandatory LFOs.

The trial court's imposition of mandatory fees was appropriate, irrespective of the defendant's present or future ability to pay. As such, this Court should affirm the trial court's imposition of the mandatory LFOs.

**4. The trial court need not inquire into whether a person has the present or future ability to pay before imposing any future award of costs on appeal.**

The defendant argues the trial court imposed LFOs to include any future award of costs on appeal without conducting an individualized inquiry into her ability to pay. Page six of the judgment and sentence states, "An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160." CP 96.

RCW 10.73.160 allows an appellate court to order convicted indigent defendants to pay appellate costs, including the fees for appointed counsel. *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997). Costs are "limited to expenses specifically incurred by the state in prosecuting or

defending an appeal or collateral attack from a criminal conviction” and include costs for producing verbatim report of proceedings, clerk’s papers, and fees for court appointed counsel. RCW 10.73.160(2), (3).

RCW 10.73.160 does not allow appellate costs to be imposed against a defendant who prevails upon appeal. *Blank*, 131 Wn.2d at 243. If a defendant prevails upon appeal, no judgment will be, or can be, issued containing any appellate costs award. *Id.* A statute which imposes an obligation to pay the costs of court-appointed counsel without opportunity for a hearing in which the defendant may dispute the amount assessed or the ability to repay, and which lacks any procedure to request a court for remission of payment, violates due process. *Fitch v. Belshaw*, 581 F. Supp. 273 (D.C.Or. 1984).

Unlike the statute in *Fitch*, RCW 10.73.160, provides that procedures in RAP Title 14 apply, including the opportunity for a defendant to object to the State’s cost bill. Title 14 authorizes the award of costs to the substantially prevailing party, unless the appellate court directs otherwise. RAP 14.2. This rule does not distinguish between indigent and non-indigent parties. *State v. Obert*, 50 Wn. App. 139, 143, 747 P.2d 502 (1987) (citing RAP 14.2). Indigent defendants must show a compelling basis for the court’s exercise of its discretion to deny costs to the

prevailing party under RAP Title 14. *State v. Nolan*, 98 Wn. App. 75, 988 P.2d 473 (1999).

Here, although the trial court conducted an individualized inquiry into the defendant's ability to pay, they were not required to do so regarding a possible order to impose any future award of costs on appeal.

The trial court's imposition of a possible future award of costs on appeal was appropriate, irrespective of the defendant's present or future ability to pay. As such, this Court should affirm the trial court's imposition of the future award of costs on appeal.

**B. RCW 43.43.7541 does not violate substantive due process and is not unconstitutional as applied to the defendant.**

**1. The defendant presented no evidence she lacks the ability to pay the \$100 DNA collection fee.**

A party may not generally raise a new argument on appeal that the party did not present to the trial court. *In re Det. of Ambers*, 160 Wn.2d 543, 557 n.6, 158 P.3d 1144 (2007). A party must inform the court of the rules of law it wishes the court to apply and afford the trial court an opportunity to correct an error. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).

RAP 2.5(a)(3) allows an appellant to raise for the first time on appeal a "manifest error affecting a constitutional right." Constitutional errors are treated specially under RAP 2.5(a) because they often result in

serious injustice to the accused and may adversely affect public perceptions of the fairness and integrity of judicial proceedings. *State v. Scott*, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). Prohibiting all constitutional errors from being raised for the first time on appeal would result in unjust imprisonment. *State v. Lynn*, 67 Wn. App. 339, 344, 835 P.2d 251 (1992). On the other hand, “permitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable re-trials and is wasteful of the limited resources of prosecutors, public defenders and courts.” *Id.*

To meet RAP 2.5(a) requirements and raise an error for the first time on appeal, an appellant must demonstrate first that (1) the error is manifest, and (2) that the error is truly of constitutional magnitude. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant’s rights. *Id.* at 926-27. It is this showing of actual prejudice that makes the error “manifest,” allowing appellate review. *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2010); *Scott*, 110 Wn.2d at 688; *Lynn*, 67 Wn. App. at 346. An important formulation for purposes of this appeal is the facts necessary to adjudicate the claimed error must be in the record on appeal. *State v. McFarland*, 127

Wn.2d 322, 333, 899 P.2d 1251 (1995); *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

In *State v. Stoddard*, \_\_\_ P.3d \_\_\_, No. 327566, WL 275318 (January 12, 2016), Stoddard argued, for the first time on appeal, that the imposition of mandatory DNA collection fee without inquiry into ability to pay violated substantive due process principle. *Id.* at 2. The record contained no information, other than Stoddard's statutory indigence for purposes of hiring an attorney, that he lacked funds to pay a \$100 fee. *Id.* at 3. The court noted that the cost of a defendant's criminal charge's defense exponentially exceeds \$100; therefore, while a defendant may not be able to afford defense counsel, one may be able to afford a payment of \$100. *Id.* The court held that because Stoddard presented no evidence of his assets, income, or debts, the record lacked the details important in resolving his due process argument. *Id.*

Similar to the holding in *Stoddard*, the record contains no information, other than the defendant's statutory indigence for purposes of hiring an attorney, that she lacks funds to pay the \$100. The defendant presented no evidence of her assets, income, or debts to show she lacked the ability to pay the \$100 DNA collection cost. The record on appeal establishes that the defendant had the present or likely future ability to

pay. Thus, the record lacks the details important in resolving the defendant's due process argument.

**2. The imposition of the \$100 DNA collection fee imposed on all adult felony offenders is rationally related to a legitimate State interest.**

The defendants argues that the imposition of the \$100 DNA collection fee violates substantive due process and is unconstitutional as applied to defendants who do not have the ability or likely future ability to pay the 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; WASH. Const. art. I, § 3. “Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.” *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 218-19, 143 P.3d 571 (2006). It requires that “deprivations of life, liberty or property be substantively reasonable.” *Nielsen v. Washington State Dep’t of Licensing*, 177 Wn. App. 45, 53, 309 P.3d 1221 (2013).

Laws that do not burden a protected class or infringe on a constitutionally protected fundamental right are subject to rational basis review. *Romer v. Evans*, 517 U.S. 620, 631, 116 S. Ct. 1620 (1996). To survive rational basis scrutiny, the State must show its regulation is

rationality related to a legitimate state interest. *Id.* (citing *Heller v. Doe by Doe*, 509 U.S. 312, 319-20, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993)).

The imposition of a \$100 DNA collection fee does not burden a protected class or infringe on a constitutionally protected fundamental right; therefore, the rational basis standard should be applied.

The rational basis standard will be upheld unless the classification rests on grounds wholly irrelevant to the achievement of a legitimate state objective. *Seeley v. State*, 132 Wn.2d 776, 795, 940 P.2d 604 (1997).

Legislative acts are presumed constitutional and the court will not find otherwise unless proved so beyond a reasonable doubt. *State v. Shawn P.*, 122 Wn.2d 553, 561, 859 P.2d 1220 (1993). The rational basis test requires only that the means employed by the statute be rationally related to legitimate state goals, and not that the means be the best way of achieving that goal. *State v. Manussier*, 129 Wn.2d 652, 673, 921 P.2d 473 (1996). The party challenging the legislation “must show, beyond a reasonable doubt, that no state of facts exists or can be conceived sufficient to justify the challenged classification, or that the facts have so far changed as to render the classification arbitrary and obsolete.” *State v. Smith*, 93 Wn.2d 329, 337, 610 P.2d 869 (1980).

RCW 43.43.754 demands a biological sample, for purposes of DNA identification analysis, from an adult convicted of a felony. In turn,

RCW 43.43.7541 imposes a \$100 mandatory fee upon the adult convicted of a felony to defray the cost of the collection of the sample. RCW 43.43.7541 reads, in relevant part:

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 obligation 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 statute 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; *see State v. Brewster*, 152 Wn. App. 856, 860, 218 P.3d 249 (2009). To that end, it is a non-punitive LFO. *Id.* at 861. The defendant concedes that this statute is a legitimate state interest. Therefore at issue is whether the imposition of the mandatory fee upon defendants who cannot pay the fee rationally serves that interest.

The imposition of the mandatory \$100 DNA collection fee does not draw any distinctions between persons. All adults convicted of a felony, regardless of their ability to pay, are required to pay the \$100 DNA collection fee. "Generally speaking, laws that apply evenhandedly to all 'unquestionably comply' with the Equal Protection Clause." *Vacco v.*

*Quill*, 521 U.S. 793, 800, 117 S. Ct. 2293, 138 L. Ed. 2d 834 (1997) (quoting *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587, 99 S. Ct. 1355, 59 L. Ed. 2d 587 (1979)). The imposition of a \$100 DNA collection fee imposed on all adult felony offenders is rationally related to the state’s interest to fund the collection, analysis, and retention of a convicted offender’s DNA profile.

Here, the trial court properly inquired into the defendant’s ability to pay her discretionary LFOs. If this Court determines the trial court failed to conduct a proper inquiry, the imposition of the DNA collection fee was properly imposed because the statute authorizing the DNA collection fee is legitimate state interest and imposition of the mandatory fee upon defendants rationally serves that interest.

**3. The imposition of the \$100 DNA collection fee imposed on all adult felony offenders following every sentence is rationally related to a legitimate state interest.**

The defendant contends that RCW 43.43.754(1) violates equal protection because it requires some defendants to pay a DNA collection fee multiple times, while others need pay only once. While RCW 43.43.754(1)(a) states that “[a] biological sample must be collected for purposes of DNA identification analysis from . . . [e]very adult or juvenile individual convicted of a felony,” the statute provides in subsection (2)

that “[i]f 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.” RCW 43.43.754(2).

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 ch. 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.

RCW 43.43.7541 mandates:

*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 obligation 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.

(Emphasis added). The crimes specified in RCW 43.43.754 include all adult felonies. RCW 43.43.754(1)(a).

As stated above, the imposition of a \$100 DNA collection fee imposed on all adult felony offenders is rationally related to the State's interest to fund the collection, analysis, and retention of a convicted offender's DNA profile.

In *State v. Thornton*, 188 Wn. App. 371, 353 P.3d 642 (2015), Thornton argued that if the Washington State Patrol Crime Laboratory already had a DNA sample from her as required in a prior felony case, collection of another DNA sample was not necessary in the current case and the sentencing court therefore erred in imposing the \$100 DNA collection fee. *Id.* at 373-74. Thornton provided no facts to support her argument suggesting a sample was already collected and submitted to the Washington State Patrol Crime Laboratory under the prior cause number. *Id.* at 374. The Court held that RCW 43.43.7541's language—"every 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 sentences. *Id.* at 374-35. "The statute also furthers the purpose of funding for the state DNA database and agencies that collect samples and does not conflict with DNA sample collection and submission provisions of RCW 43.43.754(1) and (2)." *Id.* at 375; see also *State v. Thompson*, 153 Wn. App. 325, 338, 223 P.3d 1165 (2009) (phrase "every sentence" unambiguously indicates that sentencing

is the precipitating event for imposition of the mandatory fee required by RCW 43.43.7541. The fact that a subsequent DNA sample may not be required to be submitted to the state patrol is irrelevant to the mandatory imposition of the fee.)

Here, while the defendant arguably may have been ordered to pay a \$100 DNA collection fee at the time of her five prior felony sentencings, the imposition of the DNA fee in this matter is proper. Similar to the holding in *Thompson*, the fact that a subsequent DNA sample may not be required to be submitted is irrelevant to the mandatory imposition of the fee. While the defendant states, “There is no evidence suggesting her DNA had not previously been collected and placed in the DNA database,” she provided no facts to support her argument suggesting a sample was already collected and submitted to the Washington State Patrol Crime Laboratory under the prior cause numbers. Br. Appellant at 28.

The mandatory requirement that the fee be collected from the defendant upon each sentence is rationally related to the purpose of the statute. As such, RCW 43.43.7541 does not violate equal protection. This Court should affirm the trial court’s imposition of the mandatory \$100 DNA collection fee.

**4. The trial court did not abuse its discretion when it ordered the defendant to submit to another collection of her DNA.**

The defendant contends that the trial court abused its discretion when it ordered the defendant to submit to another collection of her DNA. A trial court abuses its discretion when it is “manifestly unreasonable or based on untenable grounds.” *In re Marriage of Fiorito*, 112 Wn. App. 657, 663-64, 50 P.3d 298 (2002).

A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

*Id.* at 664.

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 is not required to be submitted.” Thus, the trial court has discretion as to whether the order the collection of an offender’s DNA under such circumstances.

Here, the trial court ordered collection of the defendant DNA pursuant to RCW 43.43.754(1). The defendant asserts that due to seven

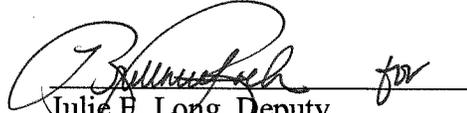
prior felony convictions, her DNA was previously collected pursuant to statute; however, she states “There is no evidence suggesting her DNA had not previously been collection and placed in the DNA database.” Br. Appellant at 28. The defendant provided no facts to support her argument suggesting a sample was already collected and submitted to the Washington State Patrol Crime Laboratory under the prior cause number.

RCW 43.43.754(1) requires that a biological sample be collected when an adult is convicted of a felony offense. Acting within the confines of the statute, the trial court properly exercised its discretion in ordering the collection of the defendant’s DNA. The court’s decision to collect the DNA was not manifestly unreasonable under the facts and applicable standard. As such, the trial court did not abuse its discretion when it ordered the defendant to submit to another collection of her DNA.

#### **IV. CONCLUSION**

For the foregoing reasons, the State respectfully requests that this Court affirm the trial court’s finding that the defendant has the ability to pay legal financial obligations, including the trial court’s imposition of the possibility of a future award of costs on appeal, order to pay the \$100 DNA collection fee, and submit an additional biological sample for DNA identification.

**RESPECTFULLY SUBMITTED** this 4th day of March, 2016.

  
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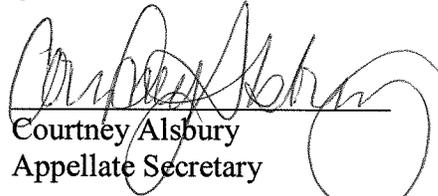
**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on March 4, 2016.

  
\_\_\_\_\_  
Courtney Alsbury  
Appellate Secretary