

FILED  
December 1, 2015  
Court of Appeals  
Division III  
State of Washington

No. 33281-1-III

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

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

ANTHINY TRAMELL SPEARMAN,  
Defendant/Appellant.

APPEAL FROM THE WALLA WALLA COUNTY SUPERIOR COURT  
Honorable M. Scott Wolfram, Judge

---

BRIEF OF APPELLANT

---

SUSAN MARIE GASCH  
WSBA No. 16485  
P. O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
Attorney for Appellant

**TABLE OF CONTENTS**

A. ASSIGNMENTS OF ERROR.....1

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

C. ARGUMENT.....6

    1. The court’s “reasonable doubt” instruction infringed Mr. Spearman’s constitutional right to due process.....6

        a. The instruction improperly focused the jury on a search for “the truth.”.....6

        b. WPIC 4.01’s language improperly adds an articulation requirement, requiring reversal.....8

            i. Jurors need not articulate a reason for doubt in order to acquit.....8

            ii. The trial court erroneously told jurors to convict unless they had a doubt “for which a reason exists.”.....9

    2. Since the directive to pay LFO’s was based on an unsupported finding of ability to pay, the matter should be remanded for the sentencing court to make individualized inquiry into Mr. Spearman's current and future ability to pay before imposing present discretionary LFOs and authorizing future discretionary LFOs.....12

a. This court should exercise its discretion and accept review....	12
b. Substantive argument.....	15
3. 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.....	20
4. 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.....	24
5. The trial court abused its discretion when it ordered Mr. Spearman to submit to another collection of his DNA.....	27
D. CONCLUSION.....	30

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Bearden v. Georgia</i> , 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).....	16
<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).....	15, 16
<i>Hopt v. Utah</i> , 120 U.S. 430, 7 S.Ct. 614, 30 L.Ed. 708(1887).....	6
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	11
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).....	10
<i>Johnson v. Louisiana</i> , 406 U.S. 360, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972).....	10
<i>Mathews v. DeCastro</i> , 429 U.S. 181, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976).....	21
<i>Sullivan v. Louisiana</i> , 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).....	7, 8, 12
<i>Victor v. Nebraska</i> , 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994).....	6, 8
<i>Humphrey v. Cain</i> , 120 F.3d 526 (5 <sup>th</sup> Cir. 1997), on reh’g en banc, 138 F.3d 552 (5 <sup>th</sup> Cir. 1998).....	9, 12
<i>United States v. Johnson</i> , 343 F.2d 5 (2 <sup>nd</sup> Cir 1965).....	10
<i>Williams v. Cain</i> , 229 F.3d 468 (5 <sup>th</sup> Cir. 2000).....	9
<i>Amunrud v. Bd. of Appeals</i> , 158 Wn.2d 208, 143 P.3d 571 (2006).....	20

<i>Bellevue John Does 1-11 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 1-11 v. Bellevue Sch. Dist. #405</i> , 164 Wn.2d 199, 189 P.3d 139 (2008).....	14
<i>DeYoung v. Providence Med. Ctr.</i> , 136 Wn.2d 136, 960 P.2d 919 (1998).....	21, 25
<i>Diaz v. State</i> , 175 Wn.2d 457, 285 P.3d 873 (2012).....	11
<i>Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 160 Wn. App. 250, 255 P.3d 696 (2011).....	14
<i>Nielsen v. Washington State Dep't of Licensing</i> , 177 Wn. App. 45, 309 P.3d 1221 (2013).....	20
<i>Nordstrom Credit, Inc. v. Dep't of Revenue</i> , 120 Wn.2d 935, 845 P.2d 1331 (1993).....	18
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	27
<i>State v. Baldwin</i> , 63 Wn. App. 303, 818 P.2d 1116, 837 P.2d 646 (1991).....	18, 19
<i>State v. Bennett</i> , 161 Wn.2d 303, 165 P.3d 1241 (2007).....	7, 8, 12
<i>State v. Bertrand</i> , 165 Wn. App. 393, 267 P.3d 511 (2011).....	18, 19
<i>State v. Berube</i> , 171 Wn. App. 103, 286 P.3d 402 (2012).....	6
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	13, 14, 15, 16, 17, 18, 20, 22, 23
<i>State v. Blazina</i> , 174 Wn. App. 906, 301 P.3d 492 (20123), <i>rev. granted</i> (Wash. Oct. 2, 2013).....	4
<i>State v. Bolton</i> (90550-9/31572-6-III).....	19
<i>State v. Brockob</i> , 159 Wn.2d 311, 150 P.3d 59 (2006).....	18
<i>State v. Bryan</i> , 145 Wn. App. 353, 185 P.3d 1230 (2008).....	25

<i>State v. Curry</i> , 118 Wn.2d 911, 829 P.2d 166 (1992).....	16, 18
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	6, 8, 9, 12
<i>State v. Gaines</i> , 121 Wn. App. 687, 90 P.3d 1095 (2004).....	24
<i>State v. Hundley</i> , 126 Wn.2d 418, 895 P.2d 403 (1995).....	8
<i>State v. Johnson</i> , 158 Wn. App. 677, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013, 249 P.3d 1029 (2011).....	9
<i>State v. Kuster</i> , 175 Wn. App. 420, 306 P.3d 1022 (2013).....	4
<i>State v. Mickle</i> (90650-5/31629-7-III).....	19
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995).....	6
<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
<i>State v. Walker</i> , 164 Wn. App. 724, 265 P.3d 191 (2011), as amended (Nov. 18, 2011), review granted, cause remanded, 175 Wn.2d 1022, 295 P.3d 728 (2012).....	9

### **Statutes**

U.S. Const. amend. 5.....	20
U.S. Const. amend. 6.....	8
U.S. Const. amend. 14.....	8, 16, 20, 24
Wash. Const., art. 1, § 3.....	8, 20
Wash. Const., art. I, § 12.....	16, 24

Wash. Const., art. 1, § 21.....	8
Wash. Const., art. 1, §22.....	8
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.....	26
RCW 9A.20.021(1)(c).....	3
RCW 9.94A.760(1).....	16
RCW 9.94A.760(2).....	16
RCW 10.01.160.....	9, 18
RCW 10.01.160(1).....	16
RCW 10.01.160(2).....	16
RCW 10.01.160(3).....	14, 16
RCW 10.73.160.....	5
RCW 36.18.020(2)(h).....	4
RCW 43.43.752–.7541.....	22
RCW 43.43.754.....	26
RCW 43.43.754(1).....	28
RCW 43.43.754(2).....	26, 28, 29
RCW 43.43.7541.....	20, 22, 23, 24, 25, 26, 27

RCW 43.43.754(6) (a).....	28
RCW 69.50.401(2)(c).....	4
RCW 69.50.408.....	4
WAC 446-75-010.....	26
WAC 446-75-060.....	26

**Court Rules**

GR 34.....	17
comment to GR 34.....	17
RAP 2.5(a).....	13

**Other Resources**

Russell W. Galloway, Jr., <i>Basic Substantive Due Process Analysis</i> , 26 U.S.F. L.Rev. 625 (1992).....	20
Steve Sheppard, <i>The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence</i> , 78 NOTRE DAME L. REV. 1165 (2003).....	11
11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.01 (3d Ed 2008).....	7, 8, 9, 10
<i>Webster’s Third New Int’l Dictionary</i> (Merriam-Webster, 1993).....	10
2012 Washington State Adult Sentencing Guidelines Manual.....	4

**A. ASSIGNMENTS OF ERROR**

1. The court erred by giving a constitutionally defective reasonable doubt instruction. CP 27, Instruction No. 3.

2. The record does not support the finding Mr. Spearman has the current or future ability to pay the imposed legal financial obligations.

3. The court erred by imposing discretionary costs.

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

5. The trial court erred when it ordered Mr. Spearman to submit to another DNA collection under RCW 43.43.754.

*Issues Pertaining to Assignments of Error*

1. A criminal trial is not a search for the truth. By equating proof beyond a reasonable doubt with “an abiding belief in the truth of the charge,” did the court undermine the presumption of innocence, impermissibly shift the burden of proof, and violate Mr. Spearman’s right to a jury trial?<sup>1</sup>

2. A juror with reasonable doubt must acquit, even if unable to articulate a reason for the doubt. By defining a “reasonable doubt” as a doubt “for which a reason exists,” did the court undermine the

---

<sup>1</sup> Assignment of Error 1.

presumption of innocence and impermissibly shift the burden of proof by telling jurors they must be able to articulate a reason to have a reasonable doubt?<sup>2</sup>

3. Does erroneously instructing a jury regarding the meaning of reasonable doubt vitiate the jury-trial right, constituting structural error?<sup>3</sup>

4. Should the finding of ability to pay Legal Financial Obligations be stricken from the Judgment and Sentence as clearly erroneous where the finding is not supported in the record?<sup>4</sup>

5. Does a trial court abuse its discretion in imposing discretionary costs where it does not take Defendant's financial resources into account nor consider the burden it would impose on him as required by RCW 10.01.160?<sup>5</sup>

6. 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?<sup>6</sup>

---

<sup>2</sup> Assignment of Error 1.

<sup>3</sup> Assignment of Error 1.

<sup>4</sup> Assignment of Error 2.

<sup>5</sup> Assignment of Error 3.

<sup>6</sup> Assignment of Error 4.

7. 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?<sup>7</sup>

8. 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?<sup>8</sup>

**B. STATEMENT OF THE CASE**

The Walla Walla County Prosecutor charged Mr. Spearman with count 1: delivery of a controlled substance (oxycodone) on August 21, 2014, and count 2: delivery of a controlled substance (dihydrocodeinone) on October 2, 2014. The state alleged both deliveries occurred within 1,000 feet of a school bus route stop or the perimeter of a school grounds. CP 19–20. The alleged incidents transpired through controlled buys using a single paid informant. CP 2.

At trial the court instructed the jury that a reasonable doubt was one “for which a reason exists.” CP 27, Instruction No. 3 at paragraph

---

<sup>7</sup> Assignment of Error 4.

<sup>8</sup> Assignment of Error 5.

three. The instruction defined satisfaction beyond a reasonable doubt as an abiding belief “in the truth of the charge.” *Id.*

The jury found Mr. Spearman not guilty of count 1. CP 46. It found him guilty of count 2, delivery of dihydrocodeinone, and determined by special verdict the delivery took place within the designated protected zones. CP 47. The court imposed a sentence of 84 months<sup>9</sup> confinement and 12 months of community custody. Mr. Spearman had seven prior felony convictions sentenced in 2002 or later. CP 56. The court ordered Mr. Spearman to provide a biological sample for DNA analysis and pay a \$100 DNA collection fee. CP 58, 62. Mr. Spearman was indigent for purposes of the proceedings below and remains indigent on appeal. CP 7, 78, 79.

The court imposed discretionary costs of \$1,825<sup>10</sup>, mandatory costs

---

<sup>9</sup> Delivery of dihydrocodeinone is a Class C felony, with a statutory maximum of 60 months. RCW 9A.20.021(1)(c); RCW 69.50.401(2)(c). It has a Level II seriousness level. 2012 Washington State Adult Sentencing Guidelines Manual, Part Two - Page 52. Mr. Spearman has an offender score of 8. Pursuant to the drug sentencing grid, the standard range for this drug felony is the same as for some other Class B drug felonies, 60 to 120 months. *Id.* at 51. Based upon Mr. Spearman’s 2003 conviction of possession with intent to deliver cocaine, the court used the doubling provisions of RCW 69.50.408 to allow for the standard range 84 month sentence inclusive of the 24 months protected zone enhancement.

<sup>10</sup> \$200 court costs (A \$200 criminal filing fee imposed under RCW 36.18.020(2)(h) is mandatory, not discretionary. *See, e.g., State v. Blazina*, 174 Wn. App. 906, 911 n.3, 301 P.3d 492 (2013), *review granted* (Wash. Oct. 2, 2013). The \$200 in court costs imposed here was not labeled as the criminal filing fee by the trial court, and therefore, it cannot be considered as such. *State v. Kuster*, 175 Wn. App. 420, 425, 306 P.3d 1022 (2013)); \$250 jury demand fees; \$100 sheriff fees including booking fee; \$775 fees for court-appointed attorney; and \$500 drug enforcement fund of Walla Walla. CP 57–58.

of \$700<sup>11</sup>, for a total Legal Financial Obligation (“LFO”) of \$2,525. The

Judgment and Sentence contained the following language:

¶ 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. ...

The court has considered 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. The court specifically finds that the defendant has the ability or likely future ability to pay the legal financial obligations ordered herein.

CP 57. Mr. Spearman did not object to the imposition of the LFOs.

The Court did not inquire into Mr. Spearman’s financial resources or consider the burden payment of LFOs would impose on him. RP 400–15. The Court ordered Mr. Spearman to pay unspecified payments towards the LFOs beginning within 90 days after release “or when funds become available in the Department of Corrections.” CP 58. The trial court also 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 59. Mr. Spearman timely appealed. CP 70–71.

---

<sup>11</sup> \$500 victim assessment; \$100 crime laboratory fee; and \$100 biological sample fee.

## C. ARGUMENT

### 1. The court's "reasonable doubt" instruction infringed Mr. Spearman's constitutional right to due process.

a. The instruction improperly focused the jury on a search for "the truth."

A jury's role is not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012). Here, the trial court instructed the jury that proof beyond a reasonable doubt means having an abiding belief "*in the truth of the charge.*" CP 27, Instruction No. 3 (emphasis added). Rather than determining the truth, a jury's task "is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760. In this case, the court undermined its otherwise clear reasonable doubt instruction by directing jurors to consider "the truth of the charge." CP 27.<sup>12</sup>

A jury instruction misstating the reasonable doubt standard "is subject to automatic reversal without any showing of prejudice." *Id.* at

---

CP 57–58.

<sup>12</sup> Mr. Spearman does not challenge the phrase "abiding belief." Both the U.S. and Washington Supreme Courts have already determined that phrase to be constitutional. See *Victor v. Nebraska*, 511 U.S. 1, 15, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (citing *Hopt v. Utah*, 120 U.S. 430, 439, 7 S.Ct. 614, 30 L.Ed. 708(1887); *State v. Pirtle*, 127 Wn.2d 628, 658, 904 P.2d 245 (1995)). Rather, Mr. Spearman objects to the instruction's focus on "the truth." CP 27.

757 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). Here, by equating proof beyond a reasonable doubt with a “belief in the truth of the charge,” the court confused the critical role of the jury.

The court’s instruction impermissibly encouraged the jury to undertake a search for the truth, inviting the error identified in *Emery*. The problem here is greater than that presented in *Emery*. In that case, the error stemmed from a prosecutor’s misconduct. Here, the prohibited language reached the jury in the form of an instruction from the court. Jurors were obligated to follow the instruction. CP 24, Instruction No. 1 at first full paragraph.

The presumption of innocence can be “diluted and even washed away” by confusing jury instructions. *State v. Bennett*, 161 Wn.2d 303, 315–16, 165 P.3d 1241 (2007). Courts must vigilantly protect the presumption of innocence by ensuring that the appropriate standard is clearly articulated.<sup>13</sup> *Id.*

Improper instruction on the reasonable doubt standard is structural error. *Sullivan*, 508 U.S. at 281–82. By equating that standard with “belief in the truth of the charge” the court misstated the prosecution’s

---

<sup>13</sup> Although the *Bennett* court approved WPIC 4.01, the court was not faced with a challenge to the “truth” language in that instruction. *Bennett*, 161 Wn.2d at 315–16.

burden of proof, confused the jury's role, and denied Mr. Spearman his constitutional right to a jury trial. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 21, 22.

b. WPIC 4.01's language improperly adds an articulation requirement, requiring reversal.

i. Jurors need not articulate a reason for doubt in order to acquit.

Due process requires the state to prove each element of a charged offense beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3; *Sullivan*, 508 U.S. 275; *State v. Hundley*, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Jury instructions must clearly communicate this burden to the jury. *Bennett*, 161 Wn.2d at 307 (citing *Victor v. Nebraska*, 511 U.S. 1, 5–6, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994)).

Instructions that relieve the state of its burden violate due process and the Sixth Amendment right to trial by jury. U.S. Const. amends. VI, XIV; *Sullivan*, 508 U.S. at 278–81; *Bennett*, 161 Wn.2d at 307. An instruction that misdirects the jury as to its duty “vitiates *all* the jury’s findings.” *Sullivan*, 508 U.S. at 279–81.

Jurors need not articulate a reason for their doubt before they can vote to acquit. *Emery*, 174 Wn.2d at 759–60 (addressing prosecutorial misconduct). Language suggesting jurors must be able to articulate a

reason for their doubt is “inappropriate” because it “subtly shifts the burden to the defense.” *Id.*<sup>14</sup>

Requiring articulation “skews the deliberation process in favor of the state by suggesting that those with doubts must perform certain actions in the jury room—actions that many individuals find difficult or intimidating—before they may vote to acquit . . . .” *Humphrey v. Cain*, 120 F.3d 526, 531 (5<sup>th</sup> Cir. 1997), on reh’g en banc, 138 F.3d 552 (5<sup>th</sup> Cir. 1998).<sup>15</sup> An instruction imposing an articulation requirement “creates a lower standard of proof than due process requires.” *Id.*, at 534.<sup>16</sup>

- ii. The trial court erroneously told jurors to convict unless they had a doubt “for which a reason exists.”

Mr. Spearman’s jury was instructed, “A reasonable doubt is one for which a reason exists . . . .” CP 27, Instruction No. 3; 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.01, at 85 (3d Ed 2008) (“WPIC”). This suggested to the jury that it could not acquit unless it could find a doubt

---

<sup>14</sup> See also *State v. Walker*, 164 Wn. App. 724, 731–32, 265 P.3d 191 (2011), as amended (Nov. 18, 2011), review granted, cause remanded, 175 Wn.2d 1022, 295 P.3d 728 (2012); *State v. Johnson*, 158 Wn. App. 677, 684–86, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013, 249 P.3d 1029 (2011).

<sup>15</sup> The Fifth Circuit decided *Humphrey* before enactment of the Antiterrorism and Effective Death Penalty Act (“AEDPA”). Subsequent cases applied the AEDPA’s strict procedural limitations to avoid the issue. See, e.g., *Williams v. Cain*, 229 F.3d 468, 476 (5<sup>th</sup> Cir. 2000).

<sup>16</sup> In *Humphrey*, the court addressed an instruction containing numerous errors, including an articulation requirement. Specifically, the instruction defined reasonable doubt as “a serious doubt, for which you can give a good reason.” *Humphrey*, 120 F.3d at 530.

“for which a reason exists.” This instruction—based on WPIC 4.01—imposes an articulation requirement that violates the constitution.

A “reasonable doubt” is not the same as a reason to doubt.

“Reasonable” means “being in agreement with right thinking or right judgment: not conflicting with reason: not absurd: not ridiculous ... being or remaining within the bounds of reason ... Rational.” *Webster’s Third New Int’l Dictionary* (Merriam-Webster, 1993). A reasonable doubt is thus one that is rational, is not absurd or ridiculous, is within the bounds of reason, and does not conflict with reason. Accord *Jackson v. Virginia*, 443 U.S. 307, 317, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (“A ‘reasonable doubt,’ at a minimum is one based upon ‘reason’”); *Johnson v. Louisiana*, 406 U.S. 360, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (collecting cases defining reasonable doubt as one “‘based on reason which arises from the evidence or lack of evidence’” (quoting *United States v. Johnson*, 343 F.2d 5, 6 n.1 (2<sup>nd</sup> Cir 1965))).

The article “a” before the noun “reason” in Instruction No. 3 inappropriately alters and augments the definition of reasonable doubt. “[A] reason” is “an expression or statement offered as an explanation of a belief or assertion or as a justification.” *Webster’s Third New Int’l Dictionary*, supra. The phrase “a reason” indicates that reasonable doubt

must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a reasonable doubt; it requires an explainable, articulable doubt—one for which a reason exists, rather than one that is merely reasonable.

Thus, this language requires more than just a reasonable doubt to acquit. *Cf. In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (“[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt.”). Jurors applying Instruction No. 3 could have a reasonable doubt but also have difficulty articulating or explaining why their doubt is reasonable.<sup>17</sup> For example, a case might present such voluminous and contradictory evidence that jurors with reasonable doubts would struggle putting their doubts into words or pointing to a specific, discrete reason for doubt. Despite reasonable doubt, acquittal would not be an option under Instruction No. 3 if jurors could not put their doubts into words.

As a matter of law, the jury is “firmly presumed” to have followed the court’s reasonable doubt instruction. *Diaz v. State*, 175 Wn.2d 457,

---

<sup>17</sup> See Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165, 1213–14 (2003).

474–75, 285 P.3d 873 (2012). The instruction here left jurors with no choice but to convict unless they had a reason for their doubts. This meant Mr. Spearman could not be acquitted, even if jurors had a reasonable doubt.

The instruction “subtly shift[ed] the burden to the defense.” *Emery*, 174 Wn.2d at 759–60. It also “create[d] a lower standard of proof than due process requires . . . .” *Humphrey*, 120 F.3d at 534. By relieving the state of its constitutional burden of proof, the court’s instruction violated Mr. Spearman’s right to due process and his right to a jury trial. *Id.*; *Sullivan*, 508 U.S. at 278–81; *Bennett*, 161 Wn.2d at 307. Failing to properly instruct jurors regarding reasonable doubt “undoubtedly qualifies as ‘structural error.’” *Sullivan*, 508 U.S. at 281–82. Accordingly, Mr. Spearman’s conviction must be reversed and the case remanded for a new trial with proper instructions. *Sullivan*, *id.* at 278–82.

2. Since the directive to pay LFO’s was based on an unsupported finding of ability to pay, the matter should be remanded for the sentencing court to make individualized inquiry into Mr. Spearman’s current and future ability to pay before imposing present discretionary LFOs and authorizing future discretionary LFOs.

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

Mr. Spearman did not make this argument below. However, the Washington Supreme Court has held the ability to pay legal financial LFOs may be raised for the first time on appeal by discretionary review. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 683 (2015). In *Blazina* the Court felt compelled to accept review under RAP 2.5(a) because “[n]ational and local cries for reform of broken LFO systems demand . . . reach[ing] the merits . . .” *Blazina*, 344 P.3d at 683. The Court reviewed the pervasive nature of trial courts’ failures to consider each defendant’s ability to pay in conjunction with the unfair disparities and penalties that indigent defendants experience based upon this failure.

Public policy favors direct review by this Court. Indigent defendants who are saddled with wrongly imposed LFOs have many “reentry difficulties” that ultimately work against the State’s interest in accomplishing rehabilitation and reducing recidivism. *Blazina*, 344 P.3d at 684. 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.” *Blazina*, 344 P.3d at 684. 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*, 344 P.3d at 685; 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 Mr. Spearman's case regardless of his 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 827, 344 P.3d at 685. Mr. Spearman’s March 23, 2015, sentencing occurred eleven days after the *Blazina* opinion was issued on March 12, 2015. Post-*Blazina*, one would expect trial courts to make the appropriate inquiry to pay inquiry on the record. The court below did not inquire. Mr. Spearman respectfully submits that in order to ensure he 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. Substantive argument.

There is insufficient evidence to support the trial court's finding that Mr. Spearman has the present and future ability to pay legal financial obligations. Courts may require an indigent defendant to reimburse the state for costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47–48, 94 S.Ct. 2116, 40 L.Ed.2d 642

(1974); *State v. Curry*, 118 Wn.2d 911, 915–16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). The imposition of costs under a scheme that does not meet with these requirements, or the imposition of a penalty for a failure to pay absent proof that the defendant had the ability to pay, violates the defendant’s right to equal protection under Washington Constitution, Article 1, § 12 and United States Constitution, Fourteenth Amendment. *Fuller v. Oregon*, supra. It further violates equal protection by imposing extra punishment on a defendant due to his or her poverty. *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.” RCW 10.01.160(1) authorizes a superior court to “require a defendant to pay costs.” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). In addition, “[t]he 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). 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. *Blazina*, 344 P.3d at 685. “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.* The remedy for a trial court’s failure to make this inquiry is remand for a new sentencing hearing. *Id.*

*Blazina* further held trial courts should look to the comment in court rule GR 34 for guidance. *Id.* 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.* (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.* 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.*

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." *Curry*, 118 Wn.2d at 916. However, *Curry* recognized that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." *Id.* at 915–16. The individualized inquiry must be made on the record. *Blazina*, 182 Wn.2d 827, 344 P.3d at 685.

Here, the judgment and sentence contains a boilerplate statement that the trial court has “considered” Mr. Spearman’s present or future ability to pay legal financial obligations and “finds” he has such ability. A finding must have support in the record. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). 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. Bertrand*, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

“Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether ‘the trial court judge

took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.’ ”  
*Bertrand*, 165 Wn. App. 393, 267 P.3d at 517, citing *Baldwin*, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted).

Here, although there was boilerplate language in the judgment and sentence, the record does not show the trial court took into account his financial resources and the potential burden of imposing discretionary LFOs including the potential “award of costs on appeal” on Mr. Spearman. RP 400–16. Despite finding him indigent for this appeal, the Court failed to “conduct on the record an individualized inquiry into [Mr. Spearman’s] current and future ability to pay in light of such nonexclusive factors as the circumstances of his incarceration and his other debts, including nondiscretionary legal financial obligations, and the factors for determining indigency status under CR 34” as is required by *Blazina*. Washington Supreme Court orders dated August 5, 2015, pp. 1–2, in *State v. Mickle* (90650-5/31629-7-III) and *State v. Bolton* (90550-9/31572-6-III) (granting Petitions for Review and remanding cases to the superior court “to reconsider the imposition of the discretionary legal financial obligations consistent with the requirements” of *Blazina*).

The boilerplate finding that Mr. Spearman has the present or future ability to pay LFOs is not supported by the record. The matter should be remanded for the sentencing court to make an individualized inquiry into Mr. Spearman 's current and future ability to pay before imposing discretionary LFOs including the potential “award of costs on appeal.” *Blazina*, 344 P.3d at 685

3. 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>18</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 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.

---

<sup>18</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.”

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 Mr. Spearman's indigent status, the order to pay the \$100 DNA collection fee should be vacated.

4. 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.

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; 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, Mr. Spearman 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. Mr. Spearman was presumably ordered to pay \$100 DNA fees at the time of his prior felony sentencings occurring after June 12, 2008, as well as in the present sentencing. CP 56, 58. 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.

5. The trial court abused its discretion when it ordered Mr. Spearman to submit to another collection of his DNA.

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 example “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 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, Mr. Spearman’s DNA was previously collected pursuant to the statute. He had seven prior felony convictions sentenced in 2002 or later. CP 56. 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. Since the prior

convictions occurred in 2002 or later, Mr. Spearman was assessed \$100 DNA collection fees at the time of these prior sentencing. There is no evidence suggesting his DNA had not been collected as ordered in the prior judgments and sentences and placed in the DNA database. Mr. Spearman 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 him to submit to another collection of his DNA. CP 115. The collection order must be reversed.

**D. CONCLUSION**

For the reasons stated, the court's reasonable doubt instruction violated Mr. Spearman's rights to due process and to a jury trial by easing the state's burden of proof and undermining the presumption of innocence. The conviction must be reversed. Alternatively, the matter should be remanded to make an individualized inquiry into Mr. Spearman's current and future ability to pay before imposing LFOs and for resentencing to vacate the orders to pay the \$100 DNA collection fee and submit an additional biological sample for DNA identification

Respectfully submitted on November 30, 2015.

---

s/Susan Marie Gasch, WSBA #16485  
Gasch Law Office, P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
FAX: None  
[gaschlaw@msn.com](mailto:gaschlaw@msn.com)