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March 21, 2016  
Court of Appeals  
Division III  
State of Washington

**NO. 33574-7-III**

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

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STATE OF WASHINGTON,

Respondent,

v.

**SHANE ROBERT HUGHES,**

Appellant.

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

The Honorable Scott R. Sparks, Judge

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**BRIEF OF APPELLANT**

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in requiring Hughes to obtain a mental health evaluation and follow any treatment recommendation as a condition of community custody.

2. The trial court erroneously imposed a substance abuse evaluation and treatment condition as a condition of community custody.

3. The trial court erred when it ordered Hughes to pay a \$100 DNA collection fee.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in imposing a community custody condition requiring mental health treatment without first following necessary statutory procedures?

2. Whether the trial court erred when it ordered Hughes to submit to a substance abuse evaluation and treatment as a condition of community custody when the court did not make a statutorily required finding that a chemical dependency contributed to the offenses?

3. Whether the mandatory \$100 DNA collection fee authorized under RCW 43.43.7541 violates substantive due process when applied to defendants who do not have the ability, or likely ability, to pay the fee?

4. Whether the mandatory \$100 collection fee authorized under RCW 43.43.7541 violates equal protection when applied to defendants

who have previously provided a sample and paid the \$100 DNA collection fee?

C. STATEMENT OF THE CASE

When Joe Shockey arrived home around 12:30 a.m. on November 13, 2014, he was surprised to see an unfamiliar car behind his house and Shane Hughes standing on his porch holding a window screen. RP<sup>1</sup> I 33, 40. Hughes told Shockey the house had been ransacked and the people who did it just left down the driveway in an SUV doing 50 miles per hour. RP I 41, 47. Shockey was skeptical. The house was in a rural area and at the end of a rutted three-quarter mile long driveway. RP I 33. No one had passed him as his friend, Katrina Tuttle, drove him home. RP I 41, 128.

Shockey saw Audrey Gibson-Lyman wrapped in a blanket in the front passenger seat of the car. RP I 45, 144. She looked drunk. RP I 45. Shockey had known Hughes for 10 years. RP I 38. Hughes had been to his house just one time and that was 10 years earlier. RP I 39. Although he occasionally saw Hughes around, he did not socialize with him and had not seen him for two and a half years. RP I 39. He did not consider

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<sup>1</sup> The verbatim report of proceedings in this appeal is referenced as follows:

“RP I” is the first day of trial held May 19, 2015.

“RP II” is the second day of trial held May 20, 2015.

“RP III” is the sentencing hearing held on June 8, 2015.

“RP IV” is the supplemental hearing transcribed for April 21, 2015.

“RP V” is the December 1, 2014 omnibus hearing.

“RP VI” is the March 2, 2015 motion hearing.

Hughes a friend and had not invited him to his house that evening. RP I 39-40.

Shockey went into his house and found it was ransacked. RP I 41, 43. He called the police without tipping off Hughes he made the call. RP I 44, 51. Kittitas County Sheriff deputies arrived within 10 minutes and passed Katrina Tuttle as she drove out. RP I 52, 128.

Shockey was mad. RP I 60. He could see items were missing from his house. RP I 43. He followed Gibson-Lyman out to her car and asked her to open the car's trunk. RP I 55. Shockey saw property from the house in the trunk. RP I 56. The property belonged both to Shockey and to the Taylor family who were living with him. RP I 41-42, 56. In his initial review of the house, he noticed a pink rifle was missing from a hall closet. RP I 42-43. He saw the rifle wrapped in his towel in the car's trunk. RP I 56-57. Shockey also noticed his pillowcase and Larry Taylor's backpack in the trunk. RP I 56.

On the ground outside of the trunk, Shockey saw boxes and cases containing his collections: DVDs, CDs, lighters, old cell phones. RP I 58-60. Neither Hughes nor Gibson-Lyman had permission to have any of the items from his house. RP I 60.

Deputy Jason Goeman interviewed Hughes. RP II 220. Hughes said he was at Robert Lubb's house earlier in the evening when a man he

knew as Cricket got in touch with him on his iPod. RP II 220-21. He knew Cricket's real name as Andrew and that he lived in Yakima. RP II 220. Cricket was in Ellensburg and suggested they meet up. RP II 221. Later, Hughes went to Shockey's house and Cricket, by coincidence, was there. RP II 221. Cricket had items from Shockey's house and Hughes took them away from him and put them in Gibson-Lyman's car. RP II 221. Hughes said he had last visited Shockey at his house in May 2013. RP II 221.

Deputy Goeman has specific expertise in determining if a person is under the influence of various substances. RP II 224. In his opinion, nothing suggested Hughes was under the influence of anything. RP II 224.

Deputy Goeman found Gibson-Lyman's car key in Hughes's pocket. RP II 220. Both Hughes and Gibson-Lyman were arrested and the car impounded. RP I 146, 163; RP II 193.

Sheriff detectives served a search warrant on the car and took pictures as they went through it. RP II 202, 218. Shockey and Larry Taylor later viewed the photos and identified their property found in the car's trunk. RP I 61-65, 99, 117; RP II 258-59. Items in the trunk included the pink rifle taken from the hall closet. RP I 42-43, 101. Larry Taylor sometimes shot the gun at coyotes that frequented the forest surrounding Shockey's house. RP I 110. Recovered too was the Taylors' daughter's jewelry box containing about \$300 of jewelry. RP I 101, 116. Besides

other miscellaneous items taken from his house, Shockey estimated at least 130 DVDs and CDs were taken. He placed the value of each DVD and CD at about ten dollars. RP I 64-65.

Sheriff detectives interviewed Hughes a second time. RP II 266. Hughes said Gibson-Lyman picked him up at Robert Lubb's house. They were both tired and needed a place to crash. They did not want to drive to her house because it was way across the valley. Instead, Hughes drove to Shockey's house. RP II 266-67. He had not been at the house for about a year. RP II 269. When he arrived at the house, Cricket and Joe the Mexican were there with a blue SUV. RP II 269. Bags were on the ground and Cricket said they were there to collect a debt against Joe Shockey. RP II 269. Hughes would not let them leave with Shockey's property so he held onto the items and Cricket and Joe the Mexican left. RP II 269.

Detective Brent Severson calculated the distance from Lubb's house to Gibson-Lyman's house and to Shockey's house. RP II 268. He estimated the drive time to Gibson-Lyman's house was about 19 minutes while the drive time to Shockey's house was 27-36 minutes. RP II 268.

Gibson-Lyman testified she picked up Hughes at Lubb's house and they drove to an area where she had earlier seen a large elk herd. RP I 139-40. When they did not find the herd, Hughes drove her car around and they eventually ended up at Shockey's house. RP I 140-42. She was asleep

for most of the time and did not know stuff was put in her car. RP I 142, 144, 148.

Marissa Jones testified on behalf of Hughes. She was Hughes's girlfriend in November 2014. RP II 282. When they were together, they frequented Shockey's house and had been there at least a dozen times to visit him. RP II 287. From her perspective, Shockey and Hughes seemed to know each other well. RP II 285.

She could contact Hughes via text on his i-Pod using Pinger app. RP II 282-83. She was with Hughes at Lubb's house on November 13 when Hughes received a message via Pinger. RP II 282. It was common for them to go to Shockey's house day or night and not to call him beforehand. RP II 288.

Hughes did not testify. RP II 290. Hughes stipulated though to having a prior felony conviction preventing him from lawfully possessing a firearm. CP 4.

There was no testimony during trial that Hughes stole property to support a drug habit.

A jury convicted Hughes as charged: Burglary in the First Degree While Armed with a Firearm, Theft of a Firearm, Theft in the Second Degree, and Unlawful Possession of a Firearm in the Second Degree. RP II 364-66; CP 1-2, 5-9.

The court ordered no pre-sentence investigation.

At sentencing, Hughes agreed to his criminal history and offender score calculation. RP III 374. Between 1996 and 1999, Hughes had eight juvenile felony convictions. Between 2000 and 2014, Hughes had 17 adult felony convictions. CP 12. Defense counsel told the court Hughes suffers from depression. RP III 382. The court reviewed supportive letters written by Hughes's mother and grandmother. RP III 379; Supplemental Designation of Clerk's Papers, Letters in Support of Defendant (sub. nom. 69).

The court sentenced Hughes to 218 months in prison plus 36 months of community custody. RP III 378, 384. As conditions of community custody, the court ordered Hughes to partake of both a mental health evaluation and any recommended treatment and a substance evaluation and any recommended treatment. RP III 379-88; CP 14, 15, 21.

The court found Hughes indigent and imposed only mandatory legal financial obligations (LFOs): a \$500 victim assessment and a \$200 criminal filing fee. CP 15, 16. The court also imposed a \$100 DNA collection fee over Hughes's objection he previously provided a DNA sample. RP III 386; CP 16.

Hughes appeals all portions of his judgment and sentence. CP 24.

D. ARGUMENT

**1. The trial court erred in ordering a mental health evaluation and treatment as a condition of Hughes's community custody.**

As a special condition of community custody, the court ordered Hughes to “obtain a mental health evaluation and undergo any recommended treatment.” CP 14-15. This condition cannot be imposed until statutory prerequisites are followed. The court’s failure to follow the mandated procedures requires reversal of this condition.

A trial court may only impose a sentence authorized by statute. *In re Post Sentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). An illegal or erroneous sentence may therefore be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). An accused has standing to challenge conditions even though he has not been charged with violating them. *State v. Riles*, 86 Wn. App. 10, 14-15, 936 P.2d 11 (1997)

A trial court’s authority to impose a sentence is limited by the authority of the Sentencing Reform Act (SRA) at the time of the offense. *State v. Barnett*, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). RCW 9.94A.345. This court reviews de novo whether a trial court exceeds its statutory authority in imposing community custody conditions. *State v. Murray*, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

Former RCW 9.94B.080 (2008),<sup>2</sup> as it existed on November 13, 2014, provided:

The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment *must* be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

(Emphasis added.)

Former RCW 9.94B.080 (2008) authorized a trial court to order a mental health evaluation as a condition of community custody only when the court followed specific procedures. *State v. Brooks*, 142 Wn. App. 842, 851, 176 P.3d 549 (2008). A court could impose the condition “if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense.” Former RCW 9.94B.080 (2008). Only offenders who met that definition were subject to mental health conditions as part of community custody under the plain language of

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<sup>2</sup> The heading of chapter 9.94B RCW states that chapter applies to crimes committed prior to July 1, 2000, but RCW 9.94B.080 applies to crimes committed after 2000. See Laws of 2008, ch. 231 § 55(1) (“Sections 6 through 58 of this act apply to all sentences imposed or reimposed on or after August 1, 2009, for any crime committed on or after the effective dates of this section.”).

Former RCW 9.94B.080 (2008). The court did not apply the procedure to Hughes.

a. There was no presentence report.

The trial court did not order a “presentence report” as required. Statutory terms should be accorded their plain meaning in the context of which they appear. *State v. Jones*, 172 Wn.2d 236, 242, 257 P.3d 616 (2011). Several Washington statutes use the term “presentence report.” The most relevant, RCW 9.94A.500,<sup>3</sup> makes it clear that a “presentence report” must be completed before the sentencing hearing. RCW 9.94A.500(1). A court may not enter an order requiring a mental health evaluation or treatment without first considering a “presentence report.” Former RCW 9.94B.080 (2008). A defendant may be found to have waived objections to information contained in a presentence report if the objections are not raised at sentencing (RCW 9.94A.530(2)); of course, this can only happen if the presentence report is completed before the sentencing hearing.

Court rules further cement this basic rule. The governing rule is titled, “Procedures Before Sentencing” and includes a subsection authorizing the court to order a presentence report be prepared by DOC,

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<sup>3</sup> The statute is titled, “Sentencing hearing – Presentencing procedures – Disclosure of mental health services information.”

and a subsection discussing the contents for such a report. CrR 7.1(a) and (b). The presentence report should be filed “at least 10 days before sentencing.” CrR 7.1(a)(3).

The case law is in accord. *See generally, State v. Sanchez*, 146 Wn.2d 339, 353-57, 46 P.3d 774 (2002) (presentence report is prepared by community corrections officer before sentencing). In short, the term “presentence report” has a plain meaning in this context, and requires the report to be prepared by the DOC before sentencing.

b. The court did not make the required “mentally ill person” finding.

At sentencing, the court considered letters provided by Hughes’s family. Helen Campbell, Hughes’s grandmother, wrote Hughes had a “compulsive disorder and needs to be doctored and medicated for and with intense counseling.” Kathy Ellinger, Hughes’s mother wrote, “[H]e has a mental disorder which he needs to take medication for.” Supp. DCP, Letters in Support of Defendant. While the court acknowledged reading the letters, the court did not use them to make the statutorily mandated finding that Hughes was a “mentally ill person” as defined by RCW 71.24.025 and that this condition likely influenced the offenses for which Hughes was convicted. CP 15.

The court thus erred in imposing the mental health treatment condition. *State v. Jones*, 118 Wn. App. 199, 202, 257 P.3d 1216 (2007); *State v. Lopez*, 142 Wn. App. 341, 353-54, 174 P.3d 1216 (2007).

The errors substantially affect Hughes's rights. The court has commanded Hughes to allow a stranger to probe his thought processes. Any mental examination entails an invasion of privacy. *Guilford Nat'l Bank of Greensboro v. Southern Ry. Co.*, 297 F.2d 921, 924 (4<sup>th</sup> Cir. 1962); *Russenberger v. Russenberger*, 623 So.2d 1244, 1245 (Fla. Dist. Ct. App. 1993). An involuntary psychological examination entails the revelation of intimate details of a person's life. An analyst conducting a mental examination undertakes "by careful direction of areas of inquiry to probe, possibly very deeply, into the psyche, measuring stress, seeking origins, tracing aberrations, and attempting to form a professional judgment or interpretation of the examinee's mental condition." *Edwards v. Superior Court*, 16 Cal.3d 905, 911, 130 Cal. Rptr. 14 (Cal. 1976).

Moreover, one purpose of the SRA is to "[m]ake frugal use of the state's and local governments' resources." RCW 9.94A.010(6) That purpose would be frustrated if resource-intensive psychological evaluations and treatment would be imposed as community custody conditions following any conviction. The Legislature did not intend to throw open the doors to such evaluations whenever a person commits a

crime. When Hughes's committed his offenses, the Legislature instead required specific statutory steps before evaluation and treatment could be imposed, showing its intent to limit this condition to a narrow class of offenders.

The condition requiring a mental health evaluation and treatment must be stricken from the judgment and sentence. *Lopez*, 142 Wn. App. at 354.

- c. Hughes's acquiescence to mental health treatment did not, and could not, invite the court's error.

The State may contend that Hughes acquiesced to the trial court imposing mental health treatment as a community custody condition, and therefore invited the error. See RP III 387. This potential response lacks merit for two reasons.

First, Hughes allocuted comments were ambiguous. The court asked Hughes if he wanted it to make a "finding there's a mental health issue that needs to be looked at for chemical dependency." RP III 387-87. After some discussion about cutbacks at DOC, Hughes said, "I mean, to mental health, yes sir." RP III 387. On this record, the State cannot convince this court Hughes fully understood or requested the sentencing court add an onerous mental health evaluation and treatment condition to his community custody.

Second, and perhaps most importantly, a court has only the sentencing authority provided by statute. *State v. Eilts*, 94 Wn.2d 489, 495-96, 617 P.2d 993 (1980) (“[A] defendant cannot empower a sentencing court to exceed its statutory authority by agreement or invitation.” *State v. Motter*, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007) (Motter’s request to receive mental health treatment as part of community custody does not give the court authority to impose it), *review denied*, 163 Wn.2d 1025 (2008), *overruled on other grounds by State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010); *see also State v. Wallin*, 125 Wn. App. 648, 661-62, 105 P.3d 1037 (2005) (rejecting state’s argument that defendant invited error when he agreed to previous court order that unlawfully extended community custody after defendant violated terms of release); *State v. Phelps*, 113 Wn. App. 347, 354-55, 357, 57 P.3d 624 (2002) (reversing part of sentence extending statute of limitations as void: “Although Phelps agreed to the extension, he cannot grant the court authority to punish him more severely than the sentencing statutes allow.”) (citing *In re Restraint of Moore*, 116 Wn.2d 30, 38-39, 803 P.2d 300 (1991) (“Since the sentence to which petitioner agreed and which he received exceeded the authority vested in the trial judge by the Legislature, we cannot allow it to stand.”))

**2. The trial court wrongly ordered a substance abuse evaluation and treatment as a condition of community custody.**

As a condition of community custody, the court ordered Hughes to “obtain substance abuse evaluation and follow all treatment recommendations.” CP 21. This was error.

RCW 9.94A.703(3)(c) allows the court to impose “crime-related treatment or counselling services” if the evidence shows the problem in need of treatment contributed to the offense. *State v. Jones*, 118 Wn. App. 199, 208, 76 P.3d 258 (2003) (addressing alcohol treatment). Before such rehabilitative treatment may be imposed, however, RCW 9.94A.607 requires the court to find a chemical dependency contributed to the offense.

*Where the court finds that the offender has any chemical dependency that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender.*

RCW 9.94A.607(1) (emphasis added).

The goal of statutory construction is to carry out legislative intent. *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). When the meaning of a statute is clear on its face, courts assume the Legislature

means exactly what it says, giving criminal statutes literal interpretation. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

The sentencing court did not explicitly find a chemical dependency stemming from drugs or alcohol contributed to Hughes's offense, nor did any evidence support such a finding. The court suggested it found no connection. "I don't think there is any evidence in this particular case of ... [chemical dependency]." This echoed Deputy Goeman's expert opinion there was no evidence Hughes was under the influence of any substances during the investigation at Shockey's house. RP II 224, 227-28. Under the plain terms of RCW 9.94A.607(1), the court had to make such a finding before it could impose the condition regarding substance abuse evaluation and treatment. There was no allegation or admission that Hughes had a substance abuse problem or that any such problem contributed to the commission of the offense.

As noted in Issue I, sentencing errors may be raised for the first time on appeal. *Jones*, 118 Wn. App. at 204; *State v. Anderson*, 58 Wn. App. 107, 110, 791 P.2d 547 (1990). This court should order the trial court to strike the condition pertaining to substance abuse treatment and counseling. *Lopez*, 142 Wn. App. 353-54 (striking community custody condition where court made no statutory required finding that mental illness contributed to the crime).

**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 collection fee.**

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

“Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.” *Amunrud*, 158 Wn.2d at 218-19. It requires that “deprivations of life, liberty, or property be substantively reasonable;” in other words, such deprivations are constitutionally infirm if not “supported by some legitimate justification.” *Nielsen v. Washington State 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. *Nielsen*, 177 Wn. App. at 53-54. 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 the 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 the 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>4</sup> This ostensibly serves the state’s

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<sup>4</sup> 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.

interest to fund the collection, analysis, and retention of a convicted offender's DNA profile to help facilitate criminal identification. RCW 43.43.752; RCW 43.43.7541. This is a legitimate interest. But imposing 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 to 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, 837, 344 P.3d 680 (2015). 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 that the \$100 DNA collection fee is such a small amount that the defendant could likely 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 other legal financial obligations included in the

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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. The statute makes this the least likely fee to be paid by an indigent defendant.

Additionally, the defendant will be saddled with a 12% interest rate on his unpaid DNA collection fee, making the actual debt incurred even more onerous in ways that reach far beyond his financial situation. Imposing mounting debt upon people who cannot pay works against another important state interest – reducing recidivism. See *Blazina*, 182 Wn.2d at 837 (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 Hughes’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 only pay 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; Wash. Const., Art. I, § 12; *Bush v. Gore*, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). 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. Here, the relevant group is all defendants subject to the mandatory DNA collection fee under RCW 43.43.7541. Having been convicted of a felony, Hughes is similarly situated to other affected persons within the afflicted group. See RCW 43.43.754; RCW 43.43.7541.

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) reasonable grounds 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 must include a mandatory fee of \$100. RCW 43.43.754; RCW 43.43.7541.

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 in 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 need for a biological sample to collect regarding 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 offender's identifying DNA profile.

Hughes's DNA was undoubtedly collected previously pursuant to statute and he argued at sentencing that it had been previously collected. RP III 386. He has 17 prior adult felony convictions dating back to 2000. CP 12. Most of these prior convictions each required collection of a biological sample for DNA identification. 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,

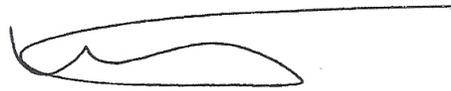
2002; Laws of 1994 c 271 § 1, eff. June 9, 1994. The \$100 DNA collection fee has been in place since at least 2002. Laws of 2002 c 289 § 2, eff. July 1, 2002. Fourteen of Hughes prior felony convictions were 2002 or later. CP 12. There is no evidence suggesting DNA had not been collected as would have been ordered in the prior judgments and sentences and placed in the DNA database. CP 12.

RCW 43.43.7541 discriminates against defendants who have previously been sentenced by requiring them to pay multiple DNA collection fees, while other defendants need only pay one DNA collection fee. The 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 ordered must be vacated.

E. CONCLUSION

This court should reverse the portion of the sentence relating to the challenged community custody conditions and remand so the illegal conditions may be stricken. Also on remand, the \$100 DNA collection fee should be vacated and stricken from Hughes's judgment and sentence.

Respectfully submitted March 20, 2016.



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LISA E. TABBUT/WSBA 21344  
Attorney for Shane Robert Hughes

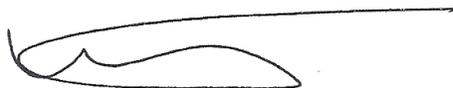
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Kittitas County Prosecutor's Office, at prosecutor@co.kittitas.wa.us; (2) the Court of Appeals, Division III; and (3) I mailed it to Shane Robert Hughes/DOC#816666, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed March 20, 2016, in Winthrop, Washington.



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