

NO. 34945-4-III

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTIAN SANDSTROM,

Appellant.

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

The Honorable Michael P. Price, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The sentencing court failed to consider, under RCW 9.94A.777, whether appellant has the means to pay legal financial obligations (LFOs) before imposing those obligations.

2. If treated as a mandatory LFO, the \$200 criminal filing fee imposed pursuant to RCW 36.18.020(2)(h) violates equal protection.

3. Irrespective of RCW 9.94A.777, the trial court should have treated the \$200 criminal filing fee as discretionary and assessed appellant's ability to pay before imposing it.

Issues Pertaining to Assignments of Error

1. Appellant suffers from mental health issues, is not capable of gainful employment, has no significant assets, and receives public assistance. The sentencing judge did not want to impose certain LFOs at sentencing but believed he had no choice. Should this matter be remanded for the judge's consideration of these LFOs under RCW 9.94A.777, which authorizes him to strike most mandatory LFOs and all discretionary LFOs where the defendant suffers from a mental health condition?

2. Other courts have permitted defendants with mental health issues to raise the sentencing court's failure to consider

RCW 9.94A.777 for the first time on appeal under RAP 2.5(a). Assuming this Court chooses not to do so, is remand still appropriate because defense counsel was ineffective for failing to bring RCW 9.94A.777 to the court's attention?

3. Criminal defendants and civil litigants are similarly situated with respect to the purpose of court filing fees, which is to fund counties, county and regional law libraries, and the state general fund. Courts may waive filing fees for civil litigants, but the Court of Appeals has held that the court may not waive filing fees for criminal litigants. Given that there is no rational basis for this differential treatment when considering the purpose of the filing fee statute, does the mandatory imposition of the \$200 criminal filing fee violate equal protection?

4. Beyond the requirements of RCW 9.94A.777, given the plain language of RCW 36.18.020(2)(h), the differences in text between RCW 36.18.020(2)(h) and other provisions of RCW 36.18.020(2), the differences between RCW 36.18.020(2)(h) and other statutes imposing mandatory legal financial obligations, and the similarities between RCW 36.18.020(2)(h) and another statute indicating a defendant "shall be liable" for legal financial obligations,

is the \$200 criminal filing fee a waivable, discretionary legal financial obligation?

B. STATEMENT OF THE CASE

The Spokane County Prosecutor's Office charged Christian Sandstrom with Robbery in the First Degree, alleging that he stole food from a downtown Spokane 7-Eleven store and used force to retain that food when confronted by store personnel. CP 1-5.

Sandstrom's competency to stand trial was an issue. He was diagnosed as suffering the effects of a traumatic brain injury and paranoid schizophrenia. CP 9-15. Following treatment at Eastern State Hospital, Sandstrom was eventually deemed competent to proceed. CP 105-114. Sandstrom deteriorated, however, and was sent back to Eastern State Hospital, diagnosed with "Other Specified Cognitive Disorder, psychosis and affective symptoms secondary to TBI," and once again deemed competent only after a period of restorative treatment. CP 115-135.

Sandstrom waived his constitutional right to trial by jury and proceeded with a bench trial before the Honorable Michael P. Price. RP 4-6; CP 139.

Judge Price's written findings of fact and conclusions of law set out the evidence at trial. On the morning of October 26, 2015,

Sandstrom entered a 7-Eleven store at the corner of Division Street and Second Avenue in Spokane. CP 141, 149. A store surveillance system recorded Sandstrom removing a canned beverage from a cold case and placing it inside his coat pocket. CP 142, 149. Sandstrom then exited the store without paying. CP 142, 149-150. Cashier Alicia Morales followed Sandstrom outside and pursued him as he ran down Second Avenue. CP 142. When Morales eventually caught up with Sandstrom and confronted him, he shoved her to the ground twice, causing pain in her leg and ankle. CP 143, 149-150.

While pursuing Sandstrom on foot, Morales had called her manager, Abdullah Momand, who was driving to the store at the time. CP 144-145. Momand rerouted to Morales's location and arrived just in time to see her shoved to the ground. CP 145. Momand attempted to intervene and claimed that Sandstrom assaulted him, too, leaving a mark or abrasion near his chin. CP 145, 150. Sandstrom subsequently put down a can of soda, which appeared to be a Coke. CP 146; RP 98, 101, 122-123, 127.

Momand and Morales continued to follow Sandstrom in Momand's car. CP 144. Although store surveillance videos did not reveal Sandstrom taking anything but the single canned beverage, both Morales and Momand testified that other 7-Eleven brand food

items (candy and honey buns) fell from Sandstrom's pockets as he ran from them. CP 144-145; RP 93-94, 106, 132-134.

Police were called and responded to the area. RP 146, 148. Sandstrom was quickly located – “sitting on the ground, staring straight ahead” – and arrested. CP 146. No items, including the soda can, were ever recovered despite a search for them. CP 148. There is a large homeless population in the area, which may explain why no items were found. CP 148.

Judge Price found that Sandstrom had committed robbery when he stole the can of soda and used force against Morales to retain it. CP 150-152. But Judge Price acquitted Sandstrom of Robbery in the First Degree (finding insufficient evidence of “bodily injury”) and instead found him guilty of the lesser degree offense of Robbery in the Second Degree. CP 152-153.

Sandstrom had no prior felony convictions. CP 179. Judge Price imposed a standard range 9-month sentence and 12 months' community custody. CP 181-182; RP 222. Judge Price entered a finding that “[r]easonable grounds exist to believe the defendant is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. RCW 9.94B.080.” CP 179. As a crime-related condition of supervision, Sandstrom was

ordered to undergo a mental health evaluation and participate in treatment or counseling services. CP 183.

On the subject of LFOs, the State asked Judge Price to impose a \$500 victim penalty assessment, a \$200 filing fee, and a \$100 DNA collection fee. RP 211. Defense counsel indicated that Sandstrom had just been qualified for social security disability payments. RP 216, 218. Counsel opposed imposition of LFOs and noted she was aware Judge Price also opposed them for indigent defendants like Sandstrom. RP 218. But – apparently resigned to the fact they would be imposed – counsel asked that Sandstrom only be required to pay \$5 per month. RP 218.

Judge Price indicated, “Christian, these fines, I don’t want to order them, but I don’t have a choice, okay? So I just wanted to make sure you knew that. I have to order \$500 victim impact, \$200 court costs, \$100 DNA, and we’ll get a payment going at \$5 a month starting March 15, 2017.” RP 222. There was no further inquiry into Sandstrom’s ability to pay these LFOs.

In a sworn declaration, Sandstrom indicated he owns no property, has no income, is unemployed, and suffers the effects of traumatic brain injury and mental health issues. CP 172-175. Sandstrom was declared indigent and entitled to pursue this appeal

at public expense. CP 176-177. He timely filed his Notice of Appeal.
CP 156-171.

C. ARGUMENT

1. APPARENTLY UNAWARE OF RCW 9.94A.777, JUDGE PRICE FAILED TO ASSESS SANDSTROM'S ABILITY TO PAY MANDATORY LFOS IN LIGHT OF HIS MENTAL HEALTH CONDITION.

Judge Price lamented that he "didn't have a choice" but to impose \$800 in mandatory LFOs as part of Sandstrom's sentence. It appears Judge Price was unaware of RCW 9.94A.777, which provides:

- (1) Before imposing any legal financial obligations upon a defendant who suffers from a mental health condition, other than restitution or the victim penalty assessment under RCW 7.68.035, a judge must first determine that the defendant, under the terms of this section, has the means to pay such additional sums.
- (2) For purposes of this section, a defendant suffers from a mental health condition when the defendant has been diagnosed with a mental disorder that prevents the defendant from participating in gainful employment, as evidenced by a determination of mental disability as the basis for the defendant's enrollment in a public assistance program, a record of involuntary hospitalization, or by competent expert evaluation.

RCW 9.94A.777(1)-(2).

In State v. Tedder, 194 Wn. App. 753, 755-756, 378 P.3d 246 (2016), the defendant argued – for the first time on appeal – that the sentencing court erred under RCW 9.94A.777(1) when it failed to consider his ability to pay LFOs in light of his history of mental illness. Division Two of this Court reversed. Because of the defendant’s prior hospitalizations, diagnoses, treatment, his established indigency – and the “pernicious consequences” of LFOs on the poor – the Tedder Court remanded for proper inquiry into the defendant’s ability to pay despite the absence of an objection below. Id. at 757 (citing State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)).

Similarly, in State v. Clark, 197 Wn. App. 1037 (2017),¹ review denied, 188 Wn.2d 1007, 393 P.3d 351 (2017), citing Tedder, Division One remanded for mandatory consideration of the defendant’s ability to pay under RCW 9.94A.777(1), where the record revealed the defendant’s history of mental illness, even though the issue was raised for the first time on appeal.

The same outcome is appropriate here. Judge Price clearly did not want to impose the additional burden of LFOs on

¹ Under GR 14.1, Sandstrom cites to this unpublished, non-binding opinion solely for its persuasive value.

Sandstrom. Sandstrom has a diagnosed mental health condition, has no assets, is not employed, and qualifies for a public assistance program. He is precisely the type of individual the Legislature targeted, and sought to help, with the enactment of RCW 9.94A.777. Yet, it appears Judge Price was unaware of the statute, which provided him the discretion to waive every LFO except for the victim penalty assessment.

This Court should follow Divisions One and Two and exercise its discretion, under RAP 2.5(a), to entertain this issue for the first time on appeal and remand for consideration of the statute.

Alternatively, if necessary to raise this issue, this Court should find defense counsel ineffective for failing to ensure Judge Price fulfilled his statutory obligation under RCW 9.94A.777.

Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel. Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). The standard of review for an ineffective assistance claim involves a two-prong test. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To satisfy the first prong, the defendant must show counsel's performance fell

below an objective standard of reasonableness. To satisfy the second prong, the defendant must show prejudice, meaning a reasonable probability that but for counsel's performance, the result would have been different. State v. Townsend, 142 Wn.2d 838, 843-44, 847, 15 P.3d 145 (2001).

"Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing Strickland, 466 U.S. at 690-691). Counsel's failure to find and apply statutes relevant to a client's case, without any legitimate tactical purpose, is constitutionally deficient performance. In re Yung-Cheng Tsai, 183 Wn.2d 91, 102-103, 351 P.3d 138 (2015).

Defense counsel opposed the imposition of LFOs, as did Judge Price, yet counsel failed to bring RCW 9.94A.777 to the court's attention. This was deficient performance. Moreover, Sandstrom suffered prejudice. Given Sandstrom's mental health issues and indigency – particularly considering Judge Price's expressed desire not to impose LFOs – there is a reasonable probability Judge Price would have stricken the \$200 filing fee and \$100 DNA collection fee. Thus, ineffective assistance of counsel provides another basis on which to hear the claim and remand the matter to Judge Price.

2. THE "MANDATORY" IMPOSITION OF THE \$200 CRIMINAL FILING FEE VIOLATES EQUAL PROTECTION GIVEN THAT SIMILARLY SITUATED CIVIL LITIGANTS ARE PERMITTED A WAIVER.

"Under the equal protection clause of the Washington State Constitution, article [I], section 12, and the Fourteenth Amendment to the United States Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment." State v. Johnson, 194 Wn. App. 304, 307, 374 P.3d 1206 (2016) (alteration in original) (quoting State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992)). When a fundamental right or constitutionally cognizable suspect class is not at issue, "a law will receive rational basis review." Id. at 308 (quoting State v. Hirschfelder, 170 Wn.2d 536, 550, 242 P.3d 876 (2010)). No fundamental right or suspect class is at issue here, so a rational basis requires that the legislation and the differential treatment alleged be related to a legitimate governmental objective. In re Det. of Turay, 139 Wn.2d 379, 410, 986 P.2d 790 (1999).

The purpose of RCW 36.18.020, including the \$200 criminal filing fee under subsection (2)(h), is the collection of revenue from filing fees paid by both civil and criminal litigants to fund counties, county or regional law libraries, and the state general fund. See

RCW 36.18.020(1) (“Revenue collected under this section is subject to division with the state under RCW 36.18.025 and with the county or regional law library fund under RCW 27.24.070”). RCW 36.18.025 requires 46 percent of filing fee monies collected by counties to “be transmitted by the county treasurer each month to the state treasurer for deposit in the state general fund.” RCW 27.24.070 requires that \$17 or \$7, depending on the type of fee involved, be deposited “for the support of the law library in that county or the regional law library to which the county belongs.” Civil and criminal litigants who pay filing fees under RCW 36.18.020 are similarly situated with respect to the statute’s purpose: their fees are plainly intended to fund counties, county or regional law libraries, and the state general fund.

Although similarly situated, criminal and civil litigants are treated differently without any rational basis for different treatment, considering the purpose of RCW 36.18.020. Civil litigants may obtain waiver of their filing fees. The comment to GR 34 directly states as much:

This rule establishes the process by which judicial officers may waive civil filing fees and surcharges for which judicial officers have authority to grant a waiver. This rule applies to mandatory fees and surcharges that have been lawfully established,

the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief. These include but are not limited to legislatively established filing fees and surcharges (e.g., RCW 36.18.020(5)); . . . domestic violent prevention surcharges established pursuant to RCW 36.18.020(2)(b)

(Emphasis added.) Civil litigants have no constitutional right to access the courts. Criminal litigants do. Yet, according to State v. Gonzales, 198 Wn. App. 151, 154-55, 392 P.3d 1158 (2017), State v. Stoddard, 192 Wn. App. 222, 225, 366 P.3d 474 (2016), and State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013), civil litigants may obtain waivers of their filing fees and criminal litigants may not. Because there is no rational basis to treat criminal litigants differently than civil litigants under a statute whose purpose is to collect filing fees to fund the state, counties, and county law libraries, interpreting and applying the RCW 36.18.020(2)(h) criminal filing fee as a nonwaivable, mandatory financial obligation violates equal protection. Under the state and federal equal protection clauses, the \$200 criminal filing fee should be treated as discretionary.

3. THE \$200 CRIMINAL FILING FEE IS NOT MANDATORY AND THE TRIAL COURT SHOULD HAVE INQUIRED INTO SANDSTROM'S ABILITY TO PAY EVEN WITHOUT THE BENEFIT OF RCW 9.94A.777.

Because the \$200 filing fee is actually discretionary, not mandatory, Judge Price erred in imposing it without first conducting an adequate inquiry into Sandstrom's financial conditions and ability to pay. This is true regardless of Judge Price's obligations under RCW 9.94A.777.

Sandstrom recognizes that Divisions Two and Three have held that the filing fee listed in RCW 36.18.020(2)(h) is a mandatory legal financial obligation. See Stoddard, 192 Wn. App. at 225; Lundy, 176 Wn. App. at 102. More recently, Division Two, when challenged on the point that Lundy does not contain reasoned statutory analysis, concluded that RCW 36.18.020(2)(h) was mandatory simply because the statute contains the word "shall." Gonzales, 198 Wn. App. at 155.²

The Gonzales court's statutory analysis was not reasoned but overly simplistic. The same goes for Lundy and Stoddard, neither of

² Our office has filed a petition for review in Gonzales in hopes to resolve the issue once and for all. The petition is set to be heard by Department One of the Supreme Court on August 1. See State v. Gonzalez, Supreme Ct. No. 94371-1.

which contained even an attempt at statutory analysis. Lundy, 176 Wn. App. at 102 (offering an unanalyzed proposition that “the legislature has divested courts of the discretion to consider a defendant’s ability to pay when imposing” the criminal filing fee); Stoddard, 192 Wn. App. at 225 (relying on Lundy for the one-sentence proposition that RCW 36.18.020(2)(h) “mandate[s] the fees regardless of the defendant’s ability to pay”). These decisions misapprehend the meaning of the word “liable” and overlook the differences in text between RCW 36.18.020(2)(h) and the statutes providing truly mandatory LFOs, the differences in text between RCW 36.18.020(2)(h) and the other provisions of RCW 36.18.020(2), and at least one other criminal statute that provides a convicted defendant “shall be liable” for all costs of the proceedings against him or her. This court should hold that the \$200 criminal filing fee provided in RCW 36.18.020(2)(h) is discretionary, not mandatory.

a. The word “liable” does not denote a mandatory obligation

By directing that a defendant be “liable” for the criminal filing fee, the legislature did not create a mandatory fee. The term “liable” signifies a situation in which legal liability might or might not arise. Black’s Law Dictionary confirms that “liable” might make a person

obligated in law for something but also defines liability as a “future possible or probable happening that may not occur.” BLACK’S LAW DICTIONARY 915 (6th ed. 1990); see also WEBSTER’S THIRD NEW INT’L DICTIONARY 1304 (1993) (defining liable as “exposed or subject to some usu. adverse contingency or action : LIKELY”). Based on the meaning of the word liable—giving rise to a contingent, possible future liability—the legislature did not intend to create a mandatory obligation.

In Gonzales, Division Two reasoned that because the statute states “shall be liable,” it “clarifies that there is not merely a risk of liability” given that the word “shall” is mandatory. 198 Wn. App. at 155. This clarifies nothing, however, because it ignores the meaning of the word “liable.” There is no difference in meaning between “shall be liable” and “may be liable.” From mandatory liability, a mandatory obligation does not follow; rather, a contingent obligation does. Even if a person must be liable for some monetary amount, it does not mean that they must actually pay the monetary amount or that the liability cannot be waived or otherwise resolved. Again, liability is, by definition, something that might or might not impose a concrete obligation. The legislature’s use of the word “liable” in RCW 36.18.020(2)(h) shows it intended the criminal filing fee to be

discretionary. Only by avoiding the meaning of the word “liable” could the Gonzales court reach its contrary result.³

- b. The linguistic differences in the other provisions of RCW 36.18.020(2) support Sandstrom’s interpretation that “shall be liable” does not impose a mandatory obligation

Sandstrom’s plain language interpretation is supported by the language of other provisions of RCW 36.18.020(2).

The beginning of the statutory subsection reads, “Clerks of superior courts shall collect the following fees for their official services,” and then lists various fees in subsections (a) through (i). Except for RCW 36.18.020(2)(h), the fees are listed directly without reference to the word “liable” or “liability.” E.g., RCW 36.18.020(2)(a) (“In addition to any other fee required by law, the party filing the first or initial document in any civil action . . . shall pay, at the time the

³ The Gonzales court also invoked the doctrine of legislative acquiescence, reasoning that because the legislature has not amended RCW 36.18.020, it must agree with Lundy. Gonzales, 198 Wn. App. at 155 n.4. This is not so. “[T]he doctrine of legislative acquiescence is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation.” Jones v. Liberty Glass Co., 332 U.S. 524, 533-34, 68 S. Ct. 229, 92 L. Ed. 142 (1947); see also Helvering v. Reynolds, 313 U.S. 428, 432, 61 S. Ct. 971, 85 L. Ed. 1438 (1941) (“While [legislative acquiescence doctrine] is useful at times in resolving statutory ambiguities, it does not mean that the prior construction has become so embedded in the law that only Congress can effect a change.”).

document is filed, a fee of two hundred dollars” (emphasis added)); RCW 36.18.020(2)(b) (“Any party, except a defendant in a criminal case, filing the first or initial document on appeal from a court of limited jurisdiction or any party on any civil appeal, shall pay, when the document is filed, a fee of two hundred dollars.” (emphasis added)); RCW 36.18.020(2)(c) (“For filing of a petition for judicial review as required under RCW 34.05.514 a filing fee of two hundred dollars.” (emphasis added)); RCW 36.18.020(2)(d) (“For filing of a petition for unlawful harassment under RCW 10.14.040 a filing fee of fifty-three dollars.” (emphasis added)); RCW 36.18.020(2)(e) (“For filing the notice of debt due for the compensation of a crime victim under RCW 7.68.120(2)(a) a fee of two hundred dollars.” (emphasis added)); RCW 36.18.020(2)(f) (“In probate proceedings, the party instituting such proceedings, shall pay at the time of filing the first document therein, a fee of two hundred dollars.” (emphasis added)); RCW 36.18.020(2)(g) (“For filing any petition to contest a will admitted to probate or a petition to admit a will which has been rejected, or a petition objecting to a written agreement or memorandum as provided in RCW 11.96A.220, there shall be paid a fee of two hundred dollars.” (emphasis added)).

These other provisions of RCW 36.18.020(2), unlike RCW 36.18.020(2)(h), state a flat fee for filing certain documents or specify that a certain fee shall be paid. RCW 36.18.020(2)(h) is unique in providing only liability for a fee. “Just as it is true that the same words used in the same statute should be interpreted alike, it is also well established that when different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word.” Simpson Inv. Co. v. Dep’t of Revenue, 141 Wn.2d 139, 160, 3 P.3d 741 (2000); see also In re Pers. Restraint of Dalluge, 162 Wn.2d 814, 821, 177 P.3d 675 (2008) (“When the legislature uses different words in the same statute, we presume the legislature intends those words to have different meanings.”).

The Gonzales decision conflicts with these cases and this canon of statutory interpretation. Because RCW 36.18.020(2)(h) contains the only provision in the statute where “liable” appears (in contrast to the other provisions that are clearly intended as mandatory), it should be interpreted as giving rise to only potential liability to pay the fee rather than imposing a mandatory obligation.

- c. RCW 10.46.190 provides that every person convicted of a crime “shall be liable to all the costs of the proceedings against him or her,” yet all the costs of proceedings are obviously not mandatorily imposed in every criminal case

RCW 10.46.190 provides,

Every person convicted of a crime or held to bail to keep the peace shall be liable to all the costs of the proceedings against him or her, including, when tried by a jury in the superior court or before a committing magistrate, a jury fee as provided for in civil actions for which judgment shall be rendered and collected. The jury fee, when collected for a case tried by the superior court, shall be paid to the clerk and applied as the jury fee in civil cases is applied.

(Emphasis added.) This statute plainly requires that any person convicted of a crime “shall be liable” for all the costs of the proceedings.

But, even though RCW 10.46.190 employs the same “shall be liable” language as RCW 36.18.020(2)(h), the legislature and the Washington Supreme Court have indicated that all costs of criminal proceedings are not mandatory obligations. Indeed, RCW 10.01.160(3) does not permit a court to order a defendant to pay costs “unless the defendant is or will be able to pay them.” Our supreme court confirmed this in State v. Blazina, 182 Wn.2d at 838-39, holding that RCW 10.01.160(3) requires the trial court to make an individualized ability-to-pay inquiry before imposing discretionary

LFOs. Even though a defendant “shall be liable” for such costs, the legislature nonetheless forbids the imposition of such costs unless the defendant can pay. This signifies that the legislature’s use of the phrase “shall be liable” does not impose a mandatory obligation but a contingent, waivable one. RCW 36.18.020(2)(h)’s criminal filing fee should likewise be interpreted as discretionary.

- d. The legislature knows how to make legal financial obligations mandatory and chose not to do so with respect to the criminal filing fee

The language of RCW 36.18.020(2)(h) differs markedly from statutes imposing mandatory LFOs. The VPA is recognized as a mandatory fee, given that it states, “When a person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment.” RCW 7.68.035 (emphasis added). This statute is unambiguous in its command that the VPA shall be imposed.

The DNA collection fee is likewise unambiguous. It states, “Every sentence imposed for a crime specific in RCW 43.43.754^[4] must include a fee of one hundred dollars.” RCW 43.43.7541 (emphasis added). Like the VPA, there can be no question that the

⁴ RCW 43.43.754(1)(a) requires the collection of a biological sample from “[e]very adult or juvenile individual convicted of a felony”

legislature mandated a \$100 DNA fee to be imposed in every felony sentence.

RCW 36.18.020(2)(h) is different. As discussed, it does not state that a criminal sentence “must include” the fee or that the fee “shall be imposed,” but that the defendant is merely liable for the fee. Although the legislature knows how to create an unambiguous mandatory fee, which must be imposed in every judgment and sentence, the legislature did not do so in this statute.

The Washington Supreme Court recently acknowledged as much in State v. Duncan, 185 Wn.2d 430, 436 n.3, 374 P.3d 83 (2016), noting that RCW 36.18.020(2)(h)’s criminal filing fee had merely “been treated as mandatory by the Court of Appeals.” That the Duncan court would identify those LFOs designated as mandatory by the legislature on one hand and then separately identify the criminal filing fee as one that has merely been *treated* as mandatory on the other hand strongly indicates there is a distinction.

Given the contingent meaning of the word “liable,” the Duncan court seemed to indicate that the meaning of the phrase “shall be liable” is, at best, ambiguous with respect to whether it imposes a mandatory obligation. Under the rule of lenity, RCW 36.18.020(2)(h)

must be interpreted in Sandstrom's favor. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2015).

- e. Judicial notice is appropriate that not all superior courts agree the criminal filing fee is mandatory

Several counties, including Washington's most populous, King, waive the \$200 criminal filing fee in every case.

Sandstrom asks this court to take judicial notice of the variance in treatment of the criminal filing fee. "Judicial notice, of which courts may take cognizance, is composed of facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy and verifiable certainty." State ex rel. Humiston v. Meyers, 61 Wn.2d 772, 779, 380 P.2d 735 (1963). This court should consult any of the hundreds of judgments and sentences from criminal cases available in the Court of Appeals to establish that not all courts, counties, and judges agree that the \$200 criminal filing fee is mandatory. Given the disparity, this court should not follow the Gonzales court's recent unanalyzed presumption that the criminal filing is a mandatory legal financial obligation.

- f. To the extent he must argue *Lundy*, *Stoddard*, and *Gonzales* are incorrect and harmful for this court not to follow them, Sandstrom so argues

Sandstrom is mindful of the perplexing problem regarding the application of stare decisis among various divisions of the Court of

Appeals, and appreciates Division Three's recent discussion of the issue in In re Personal Restraint of Arnold, 198 Wn. App. 842, 396 P.3d 375 (2017). Sandstrom agrees with Judge Becker in Grisby v. Herzog, 190 Wn. App. 786, 806-11, 362 P.3d 763 (2015), and with Judge Siddoway in Arnold, 198 Wn. App. at 855 (Siddoway, J., concurring), that the "incorrect and harmful" standard does not apply in the Court of Appeals. Panels within the same division or among the three divisions should feel unconstrained to disagree with each other given that disagreements are oftentimes necessary, appropriate, and helpful to advance and explicate the law.⁵ Nonetheless, to the extent Sandstrom must argue that Gonzales, Stoddard, and Lundy are incorrect and harmful under the standard announced in In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970), to persuade this Court to disagree with these decisions, he so argues.

⁵ As the Grisby court acknowledged, "if the first panel to decide an issue gets it wrong, the error would be perpetuated unless and until the Supreme Court took review [T]he existence of splits within the Court of Appeals [serves] the positive function of alerting the high court to unsettled areas of the law that are in need of review." Grisby, 190 Wn. App. at 810 (paraphrasing Mark DeForest, In the Groove or in a Rut? Resolving Conflicts between the Divisions of the Washington State Court of Appeals at the Trial Court Level, 48 GONZ. L. REV. 455, 504-05 (2012/13)).

Gonzales, Stoddard, and Lundy are incorrect. None of the cases provides any reasoned statutory analysis nor addresses any of the arguments Sandstrom advances here. Instead, the cases simplistically conclude that because the word “shall” appears in the statute, the criminal filing fee must be mandatory. This is not valid statutory interpretation but oversimplified shorthand intended to favor the imposition of this LFO. Gonzales, Stoddard, and Lundy were incorrectly decided.

These decisions are also harmful for all the reasons discussed in Blazina, where our supreme court recognized that “Washington’s LFO system carries problematic consequences.” 182 Wn.2d at 836. The court detailed the problem of a 12-percent interest rate imposed on even relatively small amounts in LFOs, noting “a person who pays \$25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed.” Id. at 836. This, in turn, “means that courts retain jurisdiction over impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs.” Id. at 836-37. This, in turn, “inhibits reentry: legal or background checks will show an active record in superior court for individuals who have not fully paid their LFOs.” Id. at 837. “This

active record can have serious negative consequences on employment, on housing, and on finances. LFO debt also impacts credit ratings, making it more difficult to find secure housing. All of these reentry difficulties increase the chances of recidivism.” Id. (citations omitted). Because the Washington Supreme Court has documented the harms of Washington’s LFO system, it is a forgone conclusion that case law requiring imposition of certain LFOs without a clear legislative mandate is harmful. These decisions are even more harmful considering Sandstrom’s equal protection challenge made above. Because Gonzales, Lundy, and Stoddard are incorrect and harmful, this Court should not adhere to them.

Sandstrom asks this Court to hold that the criminal filing fee listed in RCW 36.18.020(2)(h) is not mandatory, may be waived, and that the trial court should always consider a defendant’s ability to pay the fee before imposing it.

D. CONCLUSION

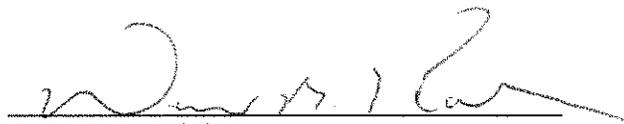
This Court should remand to allow Judge Price to assess imposition of the \$200 criminal filing fee and \$100 DNA collection fee under RCW 9.94A.777.

This Court should also find that under equal protection guarantees and principles of statutory interpretation, the \$200 criminal filing fee must be interpreted as discretionary and *always* requires an ability-to-pay determination.

DATED this 27th day of July, 2017.

Respectfully submitted,

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