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Division III
State of Washington
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No. 35529-2-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

RIGOBERTO CASTELLON VASQUEZ,
Defendant/Appellant.

APPEAL FROM THE GRANT COUNTY SUPERIOR COURT
Honorable John M. Antosz, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. RCW 7.68.035 violates substantive due process when applied to defendants who do not have the ability or likely future ability to pay.

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. 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. RCW 7.68.035 requires trial courts to impose a victim penalty assessment at each gross misdemeanor sentencing. While the statute ostensibly serves the state's interests, it mandates this assessment be imposed even when the defendant has no ability to pay it. Does this mandatory legal financial obligation (LFO) violate substantive due process when imposed on defendants who do not have the ability or likely future ability to pay?

2. 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?

3. 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

Rigoberto Castellon Vasquez was charged by amended information with one count of third degree assault with a domestic violence allegation (count 1)¹ and one count of violation of civil anti-harassment order (count 2) for an incident alleged to have occurred on December 2, 2016. CP 120–21.

April Gregg, the protected party of the civil anti-harassment order, stopped her car at a traffic light while in a left turn lane with her

¹ On the morning trial began, the court dismissed the special allegation of an aggravating factor – domestic violence regarding count 1 at the prosecutor’s request. 8/2/2017 RP 9–10.

passenger, David Hockett. Vasquez came alongside her car while driving a friend's pickup. The three people had differing stories as to what occurred next, but both vehicles were damaged after a low-speed collision. 8/2/2017 RP 65–91, 97–105, 117–142; 8/3/2017 RP 160–90, 209–16, 225–29, 270–82, 285–88. Vasquez stipulated at trial that he had been served with the protection order, and testified he made a mistake in following Ms. Gregg's car as she turned left once the light changed. 8/3/2017 RP 195, 259–60, 274–76, 285, 287; CP 212.

The jury found Vasquez guilty of violation of the court order (count 2) and it found him not guilty of the third degree assault (count 1). CP 270, 271.

The trial court sentenced Vasquez to 364 days confinement in the Grant County Jail with credit for time served and with 180 days suspended for two years contingent upon compliance with the conditions of sentence. CP 274.

Vasquez was found indigent for purposes of trial. CP 288. The trial court imposed a \$500 victim penalty assessment (“CVCA”[sic]) and \$200 in court costs. CP 275–76; 8/8/2017 RP 172.

Vasquez timely appeals. CP 296–97. The trial court found he remained indigent for purposes of appeal. CP 290–95.

C. ARGUMENT

1. RCW 7.68.035 is unconstitutional as applied to defendants who do not have the ability or likely future ability to pay legal financial obligations.

RCW 7.68.035 provides that a \$500 victim penalty assessment shall be imposed upon anyone who has been found guilty in a Washington superior court of a gross misdemeanor. Vasquez’ conviction of violation of a civil anti-harassment protection order is a gross misdemeanor. RCW 10.14.170. RCW 7.68.035 violates substantive due process when applied to defendants who are not shown to have the ability or likely future ability to pay. This court should hold that the trial court erred in imposing the victim assessment fee without first determining Vasquez’ ability to pay.

a. Imposing mandatory LFOs without any ability-to-pay inquiry fails to serve a rational state interest.

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. amend. XIV; Const. art. I, § 3. The due process

clauses confer 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. *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. Wash. State Dep't of Licensing*, 177 Wn. App. 45, 52–53, 309 P.3d 122 (2013).

The level of review applied to a substantive due process challenge depends on the nature of the right affected. *Johnson v. Wash. Dep't of Fish & Wildlife*, 175 Wn. App. 765, 775, 305 P.3d 1130 (2013). Where a fundamental right is not at issue, as 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 at its lightest under this standard, the rational basis standard is not a toothless one. *Mathews v. DeCastro*, 429 U.S. 181, 185, 97 S. Ct. 431, 50 L. Ed. 2d 389 (1976). Even under the deferential rational basis test, the court's role is to assure the challenged legislation is

constitutional. *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (determining 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 due process clauses. *Id.*

RCW 7.68.035 ostensibly services the state's interest in funding comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes. RCW 7.68.035(4). This is a legitimate interest. But there is nothing reasonable about requiring sentencing courts to impose this LFO on defendants regardless of whether they have the ability or likely future ability to pay.

Imposing fees and fines on defendants who are unable to pay does not further the state's interests. As our supreme court recently emphasized, the state cannot collect money from defendants who cannot pay. *State v. Blazina*, 182 Wn.2d 827, 837, 344 P.3d 680 (2015). There is no legitimate economic incentive served in imposing LFOs without first determining ability or likely future ability to pay.

Likewise, the state's interest in enhancing offender accountability is also not served by requiring a defendant to pay mandatory LFOs when he cannot do so. To foster accountability, a sentencing condition must be

something achievable in the first place. If it is not, the condition actually undermines efforts to hold a defendant answerable for his conduct.

Our supreme court reached this conclusion in *Blazina*, recognizing that the state's interest in deterring crime through LFOs is actually undermined when LFOs are imposed without regard to ability to pay. 182 Wn.2d at 836–37. Indeed, imposing LFOs upon those who do not have the ability to pay increases the chances of recidivism. *Id.* (citing studies and reports).

Imposing LFOs on persons who cannot pay them also undermines the state's interest in uniform sentencing. Defendants who cannot pay LFOs are subject to an indeterminate length of involvement with the criminal justice system, often end up paying considerably more than the original LFO amounts imposed due to interest and collection fees, and, in turn, often pay considerably more than their wealthier counterparts. *Id.* at 836–37.

When applied to those defendants who cannot pay and do not have the likely future ability to pay, mandatory LFOs fail to further any state interest and are pointless. It is irrational for the state to mandate that trial courts impose these criminal debts on defendants who cannot pay.

Judge Bjorgen recently explained precisely how the imposition of mandatory LFOs fails to serve a rational state interest:

Without the individualized determination required by *Blazina* for discretionary LFOs, mandatory LFOs will be imposed in many instances on those who have no hope of ever paying them. In those instances, the levy of mandatory LFOs has no relation to its purpose. In those instances, the only consequence of mandatory LFOs is to harness those assessed them to a growing debt that they realistically have no ability to pay, keeping them in the orbit of the criminal justice system and within the gravity of temptations to reoffend that our system is designed to still. Levying mandatory LFOs against those who cannot pay them thus increases the system costs they were designed to relieve. In those instances, the assessment of mandatory LFOs not only fails wholly to serve its purpose, but also actively contradicts that purpose. The self-contradiction in such a system crosses into an arbitrariness that not even the rational basis test can tolerate.

State v. Seward, 196 Wn. App. 579, 589, 384 P.3d 620 (2016) (Bjorgen, J., dissenting).

To permit the blind imposition of mandatory LFOs without an ability to pay may be justified only through dragnet rationales. 196 Wn. App. at 589. These rationales attempt to save a law that contradicts its purpose in some instances by pointing out that the law will serve its purpose in others or by hypothesizing that the contradiction may someday cease. *Id.* As Judge Bjorgen correctly surmised, if such a dragnet approach to rational basis review is sufficient to relieve the contradictions in assessing mandatory LFOs with no consideration of ability to pay, then

the rational basis test must tolerate the irrationality of clearly antagonistic purpose and effect. That irrationality itself contradicts the core of the rational basis test. *Id.*

Following Judge Bjorgen’s persuasive reasoning, Vasquez asks that this court reach the same conclusion: imposing a debt of \$500 on him without any inquiry into his ability or likely future ability to pay violates substantive due process.

b. Vasquez’ substantive due process challenge is ripe for review.

In *State v. Shelton*, 194 Wn. App. 660, 671–74, 378 P.3d 230 (2016), the court determined a nearly identical challenge was not ripe for review. The court’s analysis rested on a fundamental misunderstanding of the nature of Shelton’s challenge, however. As such, this court should address Vasquez’ challenge because it is amply ripe for review.

The *Shelton* court relied primarily on the reasoning in *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992), to conclude that constitutional principles are implicated only when the state seeks to enforce collection of the mandatory assessment. *Shelton*, 194 Wn. App. at 672. The *Shelton* court misapprehended the difference between the substantive due process challenge raised here and the constitutional principles discussed in *Curry*.

A claim is fit for judicial determinations if the issues are primarily legal, do not require further factual development, and the challenged action is final. *State v. Bahl*, 164 Wn.2d 739, 751, 793 P.3d 678 (2008). When considering whether a claim is ripe, a reviewing court must also consider the hardship to the parties of withholding a decision on the merits. *Id.* The *Shelton* court concluded that the substantive due process challenge to mandatory LFOs was primarily legal and that the challenged action is final. *Shelton*, 194 Wn. App. at 672–73. However, it erred in relying on *Curry* to conclude that the substantive due process claim required further factual development. *Shelton*, 194 Wn. App. at 672–74.

The *Curry* court considered a completely different constitutional challenge. There, the defendants challenged the constitutionality of a mandatory LFO because its future enforcement might operate unconstitutionally by permitting defendants to be imprisoned merely because they are unable to pay LFOs. *Curry*, 118 Wn.2d at 917. Thus, the constitutional challenge in *Curry* was grounded in the principle that due process cannot tolerate the incarceration of people simply because they are poor. *Id.*

This due process issue raised in *Curry* is not the same due process issue raised here or in *Shelton*. Vasquez asserts there is no legitimate state

interest in requiring sentencing courts to impose a mandatory LFO without first establishing a defendant's ability to pay. While *Curry* asked the Washington Supreme Court to consider whether the speculative future operation of a statute would be unconstitutional, Vasquez asks for the Washington courts to consider whether the statute as operated at this moment is unconstitutional. These are two different due process challenges. The court's attempt in *Shelton* to apply *Curry* as a barrier to review of different constitutional challenges, such as the one Vasquez raises here, is flawed.

Once the nature of Vasquez' substantive due process challenge is recognized for what it is, it becomes clear that no further factual development is necessary. Cf. *Shelton*, 194 Wn. App. at 672 (the potential risk of hardship did not justify review before the relevant facts were fully developed). The trial court never made any finding that Vasquez has the ability or likely future ability to pay LFOs. As was the case in *Blazina*, the facts necessary to decide this issue are fully developed. See *Blazina*, 192 Wn.2d at 832 n.l. Either the trial court employed a statute that is unconstitutional as applied to those who cannot pay the victim penalty

assessment fee or it did not. No further factual development is necessary.²

Curry does not create a ripeness barrier to Vasquez' substantive due process challenge. Consistent with *Blazina*, this court should review his challenge because it is ripe for review.

c. Vasquez' constitutional challenge is reviewable pursuant to RAP 2.5(a)(3).

The court in *Shelton* wrongly concluded Vasquez' substantive due process challenge is not a manifest error subject to review under RAP 2.5(a)(3). *Shelton*, 194 Wn. App. at 674.

Under RAP 2.5(a)(3), the appellate court may refuse to review any claim of error not raised in the trial court. One exception is that a party may raise manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3). "[C]onstitutional errors are treated specially because they often result in serious injustice to the accused." *State v. Lamar*, 180 Wn.2d 576, 582, 327 P.3d 46 (2014) (quoting *State v. Scot*, 110 Wn.2d 682, 686, 757 P.2d 492 (1988)).

Vasquez' substantive due process challenge pertains to a manifest

² Contrary to the court's conclusion in *Shelton*, Division Two has held that, pursuant to *Blazina*, a substantive due process challenge to mandatory LFOs is ripe for review. *State v. Graham*, 194 Wn. App. 1033, 2016 WL 3598554, at *5 (2016) (unpublished, cited pursuant to GR 14.1(a) as non-binding authority).

constitutional error. An error is manifest under RAP 2.5(a)(3) if it is a constitutional error that had practical and identifiable consequences at trial or at sentencing. *Lamar*, 180 Wn.2d at 583. Vasquez' substantive due process rights were violated by the trial court's imposition of \$500 in LFOs without any showing of his ability or likely future ability to pay. This error has practical and identifiable consequences: a payment obligation of \$500 without any inquiry into ability to pay unjustly burdening Vasquez with criminal debt without any rational basis to conclude that the state will ever recoup this amount. The error Vasquez raises qualifies as manifest constitutional error.

Furthermore, "[t]he imposition and collection of LFOs have constitutional implications and are subject to constitutional limitations." *State v. Duncan*, 185 Wn.2d 430, 436, 374 P.3d 83 (2016). From its reading of the United States Supreme Court's decision in *Fuller v. Oregon*, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974), our supreme court distilled several constitutional requirements, including that repayment must not be mandatory, repayment may be ordered only if the defendant is or will be able to pay, and the financial resources of the defendant must be taken into account. *Duncan*, 185 Wn.2d at 436 (quoting *Curry*, 118 Wn.2d at 915–16) (quoting *State v. Eisenman*, 62 Wn.

App. 640, 644 n.10, 810 P.2d 55, 817 P.2d 867 (1991) (citing *State v. Barklind*, 87 Wn.2d 814, 817, 557 P.2d 314 (1976)). These constitutional requirements have not been honored here or in any case that approves of the automatic imposition of mandatory LFOs.

Defendants with no likelihood of having the means to repay are not put under even a conditional obligation to do so, and those upon whom a conditional obligation is imposed are not subjected to collection procedures until their indigency has ended and no manifest hardship will result. *Fuller*, 417 U.S. at 46. In conflict with *Fuller*, all criminal defendants who are found guilty of felonies or gross misdemeanors in Washington superior courts are put under a mandatory obligation to repay a \$500 victim penalty assessment without any inquiry into their financial circumstances. Had the *Fuller* Court been reviewing Washington's mandatory LFOs and the dragnet rationale the courts have used to justify them, cf. *Seward*, 384 P.3d at 626 (Bjorgen, J., dissenting), it would determine Washington's statutes are constitutionally infirm. The error in imposing \$500 without an ability-to-pay determination is a manifest constitutional error.

Finally, RAP 2.5 vests appellate courts with discretion to review Vasquez' claim of error. *Duncan*, 185 Wn.2d at 437 (while appellate

courts may refuse to review any claim of error not raised in the trial court they are not required to). Given the ample and increasing evidence that LFOs imposed against indigent defendants who are unable to pay place significant burdens on offenders and our community, including increased difficulty in reentering society, the doubtful recoupment of money by the government, and the inequities in administration, this court should exercise its discretion and address Vasquez' substantive due process challenge to the \$500 in mandatory LFOs on the merits. *Id.* (quoting *Blazina*, 182 Wn.2d at 835–37).

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 [1], 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, *rev. denied*, 188 Wn.2d 1022 (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 Vasquez' ability to pay.

Vazquez 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 36.1 8.020(2)(h) was mandatory simply because the statute contains the word "shall." *Gonzales*, 198 Wn. App. at 155.

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

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. 97, 85 L. Ed. 1438 (1941) ("While [legislative acquiescence doctrine] is useful at times in resolving statutory ambiguities, it does not mean that the

b. The linguistic differences in the other provisions of RCW 36.17.020(2) support Vasquez' interpretation that "shall be liable" does not impose a mandatory obligation.

Vasquez' 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 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

prior construction has become so embedded in the law that only Congress can effect a change.").

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 43.43.754⁴ must include a fee of one hundred dollars." RCW 43.43.7541 (emphasis added). Like the VPA, there can be no question that the 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 at 436 n.3, 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

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"

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 Vasquez' 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.

Vasquez 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, Vasquez so argues.

Vasquez 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). Vasquez 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 Vasquez must argue that *Gonzales*,

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*

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.

Gonzales, *Stoddard*, and *Lundy* are incorrect. None of the cases provides any reasoned statutory analysis nor addresses any of the arguments Vasquez 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

Conflicts between the Divisions of the Washington State Court of Appeals at the Trial

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 Vasquez' equal protection challenge made above. Because *Gonzales*, *Stoddard*, and *Lundy* are incorrect and harmful, this Court should not adhere to them.

Vasquez 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.

4. Appeal costs should not be awarded.

In determining whether costs should be awarded in the trial court our Supreme Court has held:

The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors . . . such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

Blazina, 182 Wn.2d at 838. Under RCW 10.73.160(1), the appellate courts have broad discretion whether to grant or deny appellate costs to the prevailing party. *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000).

Ability to pay is an important factor in the exercise of that discretion, although it is not the only relevant factor. *State v. Sinclair*, 192 Wn. App. 380, 388, 367 P.3d 612, *rev. denied*, 185 Wn.2d 1034 (2016); *see also State v. Grant*, 196 Wn. App. 644, 649–50, 385 P.3d 184 (2016). The appellate courts should also consider important nonexclusive factors such as an individual's other debts including restitution and child support (*Blazina*, 182 Wn.2d at 838) and circumstances including the individual's age, family, education, employment history, criminal history, and the length of the current sentence in determining whether a defendant "cannot

contribute anything toward the costs of appellate review.” *Sinclair* 192 Wn. App. at 391. *Sinclair* held, as a general matter, that “the imposition of costs against indigent defendants raises problems that are well documented in *Blazina*—e.g., ‘increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.’ ” *Sinclair*, 192 Wn. App. at 391 (quoting *Blazina*, 182 Wn.2d at 835).

Mr. Vasquez was 50 years old at time of trial. 8/3/2017 RP 265.

The court appointed trial counsel due to his indigency. CP 288. The court found he remained indigent for purposes of this appeal and was entitled to appointment of counsel and costs of review at public expense. CP 290.

In light of Mr. Vasquez’ indigent status, and the presumption under RAP 15.2(f), that he remains indigent “throughout the review” unless the appellate court finds his financial condition has improved “to the extent [he] is no longer indigent,”⁶ this court should exercise its discretion to waive appellate costs.⁷ RCW 10.73.160(1).

⁶ *Accord*, RAP 14.2, which provides in pertinent part:

When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances **have significantly improved since the last determination of indigency**. (Emphasis added).

⁷ Appellate counsel anticipates filing a report as to Mr. Vasquez’ continued indigency no later than 60 days following the filing of this brief.

D. CONCLUSION

To comport with substantive due process, this court should vacate the trial court's order that Vasquez pay a victim penalty assessment of \$500 and remand for a hearing on his ability to pay. This court should also remand to allow the trial court to re-assess its imposition of the \$200 criminal filing fee. 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. Should the State be deemed the substantially prevailing party, this court should exercise its discretion to waive appellate costs.

Respectfully submitted on March 12, 2018.

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I, Susan Marie Gasch, do hereby certify under penalty of perjury that on March 12, 2018, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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